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# REPORTS OF CASES

DECIDED IN THE

## COURT OF QUEEN'S BENCH,

BY

CHRISTOPHER ROBINSON, Q.C.,  
BARRISTER-AT-LAW AND REPORTER TO THE COURT.

VOL. XXXII.

CONTAINING THE CASES DETERMINED  
FROM MICHAELMAS TERM, 35 VICTORIA, TO EASTER TERM, 36 VICTORIA,  
WITH A TABLE OF THE NAMES OF CASES ARGUED,  
A TABLE OF THE NAMES OF CASES CITED,  
AND DIGEST OF THE PRINCIPAL MATTERS.

TORONTO :

ROWSSELL & HUTCHISON.

1873.

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REPORTS OF CASES

HARRIS, J. AND REPORTS OF THE JUDGES

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ROWSELL AND HUTCHISON, LAW PRINTERS, TORONTO.

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THE HONORABLE JUSTICE OF THE PEACE  
JAMES C. HARRIS, J.  
FOR 1871

TORONTO  
ROWSELL & HUTCHISON

1871



JUDGES  
OF THE  
COURT OF QUEEN'S BENCH

DURING THE PERIOD OF THESE REPORTS.

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THE HONORABLE WILLIAM BUELL RICHARDS, C. J.

“ “ JOSEPH CURRAN MORRISON, J.

“ “ ADAM WILSON, J.

---

*Attorney-General.*

THE HONORABLE ADAM CROOKS.





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# REPORT OF CASES

IN THE

## COURT OF QUEEN'S BENCH.

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MICHAELMAS TERM, 35 VICTORIA, 1871 (*Continued*).

(*November 20th to December 9th.*)

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*Present :*

THE HON. WILLIAM HENRY DRAPER, C. B.,  
*Chief Justice of Appeal (a).*

“ JOSEPH CURRAN MORRISON, J.

“ ADAM WILSON, J.

---

HALL, ASSIGNEE OF JOHN W. PATTERSON, AN INSOLVENT,  
v. GEORGE DUNSFORD.

*Insolvency—Agreement—Construction.*

The creditors of one P., an insolvent, consented, by an agreement, that the plaintiff, as guardian of the estate, and the defendant should sell certain timber manufactured by the insolvent, and pay defendant out of the proceeds \$5,500, which he claimed, upon defendant giving to the guardian his bond to repay the same, or so much as defendant might not be entitled to; defendant (it was said in the agreement) claiming such timber, or a lien on it, and the creditors insisting that the estate owned or had some claim thereon. The bond recited this agreement, and the condition was that defendant should repay such portion of the \$5,500 as he should not be entitled to.

The plaintiff sued on this bond, averring the sale of the timber and payment to defendant of the \$5,500; and that defendant was not entitled to the same, but had not repaid it. Defendant pleaded that he duly established his right to the \$5,500 by filing with the assignee the particulars of his claim thereto, duly verified, as provided by the Insolvent Act of 1869. The plaintiff replied, setting out the particulars of de-

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(a) The Chief Justice of Appeal sat during this Term, under the 34 Vic. ch. 9, O., for RICHARDS, C. J., who was absent on account of illness, except at the hearing of the Monck Election Case, hereinafter reported.

defendant's claim and verification thereof (which shewed it to be the claim in question), and alleged that such claim had not been placed on any dividend sheet, nor in any manner adjudicated or awarded upon. To this the defendant rejoined, that it had not been contested or objected to, and the plaintiff, as assignee, had not prepared any dividend sheet of the estate.

*Held*, that the rejoinder was good, for that, looking at the position of the parties and the agreement, the meaning of the bond was, that defendant should repay what, after a contestation of his claim, it might appear that he was not entitled to rank for; and the action, therefore, was premature.

DECLARATION, that defendant, by his bond, bearing date the 3rd of April, 1871, became bound to the plaintiff, then being the guardian of the estate and effects of the insolvent under the Insolvent Act of 1869, in the penal sum of \$10,000, to be paid by defendant to plaintiff, subject to a condition, whereby—after reciting that defendant and the creditors of the insolvent had theretofore entered into a consent and agreement in the words and figures following, that is to say :

“Insolvent Act of 1869. In the matter of John W. Patterson, an insolvent. We, the undersigned creditors, do hereby consent that the guardian and George Dunsford shall forthwith sell all the timber, saw logs, boom timber, floats, and other stuff got out or manufactured by the insolvent during the present season, to the best advantage, and out of the proceeds the sum of \$5,500 shall be immediately paid to said G. D., who claims the same, upon his giving to the assignee to be appointed herein, or to the guardian, his own bond in the penal sum of \$10,000, conditional to repay the same, or such part thereof as the said D. may not be entitled to; said G. D. at present claiming the said timber, &c., or some portion thereof, as owner, or to have a lien thereon for the said sum, or some portion thereof, and the said creditors aforesaid now insisting that the said timber, &c., belongs to the estate, or that the estate is entitled to some lien or claim thereon, or on some part thereof. In consideration of the above, the said G. D. agrees that he will, and does, hereby abandon all claim that he may have upon the said estate over the said sum of \$5,500, except as to the timber, &c., either taken out of or

now lying on, &c., (specifying certain lots), the said last-mentioned timber, &c., and the proceeds thereof, being claimed by said G. D. absolutely as owner thereof, or as being entitled to the proceeds thereof, said G. D.'s rights to be established; and further, that he will take up and retire all promissory notes, &c., of said Patterson endorsed by said G. D., said notes in fact representing the greater portion of said G. D.'s claim; the said last-mentioned timber, &c., and a certain chattel mortgage, and the chattels and money therein mentioned, dated the 9th of April, 1870, from said Patterson to said G. D., to stand upon their own merits, and not included in the estimate of the above-mentioned \$5,500, or in the surplus as spoken of as abandoned by the said G. D. ;”

The condition of the said bond was declared to be, that if defendant should repay to the plaintiff, as such guardian as aforesaid, or to such person as might be entitled thereto on behalf of the estate of the said John W. Patterson, such portion, if any, of the said sum of \$5,500 as the defendant should not be entitled to, then the bond should be void. And the plaintiff, as such guardian as aforesaid, and the defendant, thereupon sold the said timber, saw-logs, boom timber, floats, and other stuff, pursuant to the said agreement in the said bond recited, and in further pursuance of the said recited agreement the sum of \$5,500 or thereabouts, being from and out of the proceeds of such sale, was thereupon paid to the said defendant. And the plaintiff avers that the said defendant was not entitled to the said sum of \$5,500, or any part thereof, yet the defendant hath not repaid the same, or any part thereof, to the plaintiff, pursuant the said condition.

Third plea: that under the provisions of the Insolvent Act of 1869 the defendant duly established his right to the said sum of \$5,500 by filing with the plaintiff, as such assignee as aforesaid, the particulars of his claim thereto, duly verified, in the manner and form provided by the said Insolvent Act.

Replication: that the particulars of the defendant's claim filed with the plaintiff, as such assignee as aforesaid,



and the verification thereof in the plea mentioned, are in the words and figures following, that is to say :

"Insolvent Act of 1869. In the matter of John W. Patterson, an insolvent, and George Dunsford, claimant." [The papers set out were defendant's affidavit, that the insolvent was indebted to him in the sum of \$6,095.18, balance due on certain moneys and goods advanced and paid to him under certain contracts, written and verbal, made between them, as per an account annexed stated : that he held certain specified securities, and no other, for the claims, being an agreement dated 28th September, 1870, of which a copy was annexed, made between the insolvent and deponent, for the timber and logs therein mentioned ; a certain chattel mortgage dated the 9th of April, 1870, for \$235 ; a certain other chattel mortgage dated 10th of October, 1870, for \$1,428 ; also all the timber, &c., got out, &c., by the insolvent, or for him, on certain lands specified : that to the best of his knowledge and belief the securities are of the value of \$5,500.

The "Statement" or account referred to included :

1870.

April. To amounts advanced on notes between	
September, 1870, and this date.....	\$5,022 00
" value of timber.....	1,050 00
" interest .....	60 00]

And that no other or different particulars of the defendant's said claim have been filed with the plaintiff, as such assignee as aforesaid ; and that the said claim so filed has not been placed upon any dividend sheet in the matter of said insolvent, nor has the cause been in any manner adjudicated upon, nor has any award been made in respect thereof, under the provisions of the said Insolvent Act of 1869.

The defendant rejoined that his said claim filed as in the third plea and the said second replication thereto mentioned had not been contested or objected to ; and the plaintiff, as assignee as aforesaid, had not prepared any dividend sheet of the estate of the said insolvent.

The plaintiff demurred to the rejoinder, on the following grounds: 1. The simple filing of a claimant's claim under the Insolvent Act, in the absence of any contestation with regard to it, and without any dividend sheet confirming it, does not establish the claimant's claim; 2. The condition of the bond sued on does not depend upon the establishment of the defendant's claim under the Insolvent Act, and such establishment of the defendant's claim does not constitute any answer to the bond sued on; 3. That it appears that the claim of the defendant, and his right to retain the said sum of \$5,500, depends upon the rights of ownership or of lien which he may have been entitled to in respect of the timber, &c., mentioned in the declaration; and, this being so, his rights of ownership or lien could not be settled and determined by his filing such a claim as that set out in the replication; and the fact that such claim has not been contested or objected to, or that the plaintiff, as such assignee, has not declared any dividend sheet, cannot make any difference, and is immaterial.

*Harrison, Q.C.*, for the demurrer, cited *Robson on Bankruptcy*, 156, 631, rule 72.

*C. S. Patterson*, contra.

MORRISON, J., delivered the judgment of the Court.

The condition of the bond set out in the declaration is; that if the defendant should repay the plaintiff such portion, if any, of the sum of \$5,500 as this defendant should not be entitled to, then, &c. It is, we think, apparent that what is meant by "should not be entitled to," is as against the claim of the insolvent's estate, for it is stated in the recited agreement set out in the bond that the property out of which the \$5,500 was realized and paid to the defendant was, on the one hand, claimed by the defendant as owner thereof, or as having a lien on it, and, on the other hand, by the creditors of the insolvent as belonging to the estate, or as entitled to some lien or claim thereon. And as the \$5,500 was paid to the defendant with the consent of

the creditors, and for the considerations mentioned in the recited agreement, we think we must assume that *prima facie* the defendant was entitled to receive the proceeds of the property, and that before the plaintiff could be in a position to enforce this bond, it was incumbent on him or the creditors of the estate to shew that the estate was entitled to the \$5,500, or some portion of these moneys.

It is manifest that it was intended the rights of the respective claimants should be determined and ascertained in some legal way, either by action or proceeding on behalf of the insolvent's estate against the defendant, or by the defendant proving against the estate for his claim, shewing he was entitled to the proceeds of, or a lien on, the property in question; and upon this latter proceeding the plaintiff, or any creditor, upon taking the necessary steps under the provisions of the Insolvent Act, might contest and have determined the validity of the defendant's claim.

Now the defendant by his plea shews that he pursued this latter mode, and he avers that he duly established his right, &c.; and as an answer to this plea the plaintiff sets out the proof of claim furnished by the defendant under oath to the plaintiff as assignee, under the provisions of the 122nd section of the Insolvent Act; and it appears that the defendant's claim so proved, and the securities the defendant held for his claim, embrace the property and are the same referred to in the recited agreement set out in the bond. The replication then states that the defendant's claim so filed had not been placed on any dividend sheet, or in any manner had been adjudicated upon or any award made in respect thereof.

The defendant rejoins that the claim he so made had not been contested or objected to, and that the plaintiff or assignee had not prepared any dividend sheet of the insolvent estate.

We are of opinion that the rejoinder is good. The defendant's claim as set out is one for which *prima facie* he had a right to prove and to rank as a creditor under the 56th section of the Insolvent Act. And, the same being

filed with the assignee, if the defendant's claim was disputed, or objected to by the creditors of the estate, or any of them, or by the assignee, or in respect of its ranking as a secured claim on property of the insolvent, the assignee is empowered to hear and examine the parties, and their witnesses, &c., and make an award in the premises, which would be final unless appealed from within three days, &c.: sec. 70. And by the 72nd section it is declared to be the duty of the inspectors, and of the assignee under their direction, to examine the claims filed before the assignee, and to obtain information as to their correctness; and when they consider it expedient that any claim, dividend, or collocation be contested, they may order the contestation thereof at the expense of the estate, and such contestation may be made in their names, or in the name of any creditor consenting thereto.

Now looking at these provisions, and the position of these parties and the matters recited in the bond, it is only reasonable to hold that what the parties meant and intended by this bond and condition was, that the defendant should repay to the estate the \$5,500, or such portion of it as after a contestation of his claim it would appear he was not entitled to claim and rank for as a secured creditor, or as having a lien or right to the property in question.

If this view of the case is correct, then on these pleadings it appears that the defendant did all he could do to prove and establish his claim to be entitled to the \$5,500, and that if the correctness of the defendant's claim so filed was disputed, the *onus* lay upon the plaintiff or the creditors of the estate to contest the claim, and have an award in respect of the matter made, the statute providing in the most ample manner for its contestation; or, in another point of view, the defendant has taken the means to establish his claim, and such claim is in the course of being established, and so this action is prematurely brought.

The defendant, in our opinion, is entitled to judgment on the demurrer.

*Judgment for defendant.*



## PLUMB V. MCGANNON.

*Right of way—Construction of grant—Action for obstructing—Proof of damage—Estoppel—"High water mark," "water's edge"—Devise—After acquired property—Right of action by one tenant in common.*

O., on the 15th December, 1848, conveyed to P. part of lot 33, bounded by a highway on the north, extending to the water's edge of the river St. Lawrence, and thence easterly along the water's edge, which formed its southern limit; and he conveyed by the same deed, "as appurtenant to the land, a full, free, and unrestricted right of way in, over, upon, and along, and to use as a public highway or street, a certain strip of land, of twenty feet in breadth, adjoining the westerly side of the said parcel of land, extending from the highway aforesaid to the water's edge of the river St. Lawrence, at all times and seasons for ever hereafter." The patent to O. for the same land extended only to high water mark of the river.

P., by his will, dated 29th March, 1847, after giving several legacies, devised in fee to the plaintiff, who was also one of his heirs-at-law, the rest and residue of his estate, both real and personal. Defendant, who claimed the rest of lot 33 not conveyed, erected a boat-house in the river, partly above high-water mark, covering almost ten feet in width of the strip of twenty feet.

In an action for thus obstructing the plaintiff's right of way:

*Held*, 1. That the way was clearly a private, not a public way, the words "to use as a public highway or street" indicating only the extent to which the grantee might use it.

2. That the obstruction, without actual damage, gave the grantee a cause of action, for it was an interference with his easement, which, if submitted to, would become a right.

3. That it would be no defence that the boat house was below high water mark, though O.'s right only extended so far, for O. and the defendant, claiming under him, were estopped by O.'s deed to P., which granted to the water's edge.

*Per Wilson, J.*, high water mark is the limit of the highest ordinary state of the river, or its average height in its ordinary state after the spring flood has abated, not the highest limit reached in the year.

*Per Draper, C. J. of Appeal*, and *Wilson, J.* This land, acquired after the date of P.'s will, did not pass by the residuary devise to the plaintiff; but *Held*,

4. That the plaintiff, as one of P.'s heirs-at-law, could maintain the action, there being no plea of non-joinder.

CASE.—For the obstruction of a right of way from the plaintiff's land, in the township of Edwardsburg, over a certain close to a public highway, and back again, and from his land over and along the close to a certain public navigable river, and back again; setting out the right in four different counts in different forms.

The defendant pleaded, 1. Not guilty, to the whole declaration; 2. To the first count, that the plaintiff was

not possessed of the land as alleged ; 3. To the first count, that the plaintiff was not entitled to the right of way claimed.

The like pleas as the second and third were pleaded also, severally, to the second, third, and fourth counts.

Issue.

The cause was tried at the last Fall Assizes at Brockville, before Richards, C. J., when a verdict was rendered for the plaintiff for nominal damages, subject to the opinion of the Court.

It appeared that both plaintiff and defendant claimed title under one John O'Connor.

By deed dated 15th December, 1848, John O'Connor conveyed to Isaac Plumb, the younger, three-quarters of an acre of land in the township of Edwardsburg, being a part of the east half of lot number 33, in the first concession.

The lot was described as commencing on the south side of the travelled public highway running across the whole lot, and, from the point there described, the easterly side line of the portion conveyed extended parallel to the side line of lot number 33, 231 feet, more or less, to the water's edge of the river St. Lawrence. The northern boundary extended along the highway 156 feet ; the westerly line was parallel to the easterly limit, and extended 165 feet, more or less, to the water's edge of the river ; and then the course from that point was easterly along the water's edge to the terminus of the easterly line on the river. There was also conveyed "as appurtenant to the land aforesaid, and to every part and parcel thereof, a full, free, and unrestricted right of way in, over, upon, and along, and to use as a public highway or street, a certain strip of land, of twenty feet in breadth, adjoining the westerly side of the certain parcel or tract of land aforesaid, and extending from the highway aforesaid to the water's edge of the river St. Lawrence, at all times and seasons forever hereafter."

By will, dated the 29th of March, 1847, the grantee, Isaac Plumb, the younger, bequeathed legacies to several

persons, and then he devised as follows: "I do will bequeath, and devise to my nephew Charles Plumb" (the plaintiff), "and to his heirs and assigns forever, all the rest and residue of my estate, both real and personal, subject to the legacies and payments herein mentioned."

Defendant claimed the whole of the east half of lot number 33, but the portion which was conveyed to Isaac Plumb the younger, in right of himself and of his wife, who was one of the heiresses of John O'Connor, the owner.

The obstruction complained of, was the erection by the defendant of a boat house, 10 feet three inches by 18 feet 9 inches, and not quite ten feet high, on the line of twenty feet reserved for a way between the highway and the river, or partly on that line and on its prolongation into the river.

The evidence shewed that it stood almost altogether on the dry land, and about 8 or 10 feet into the line of way.

*A. N. Richards, Q.C.*, for the plaintiff. The way is not a public way, as contended by defendant, but a private one. There never was a dedication of it, nor any public work done on it, and it has scarcely ever been used by any one, though quite open as a common all about it, except by the plaintiff, and by his devisor, the grantee of it. The wrong complained of is of no great importance, except as it affects the plaintiff's rights. If the defendant maintain the erection for twenty years, he will acquire a right to keep it there forever as against the plaintiff. It is to prevent this that the action has been brought; and the plaintiff is entitled to maintain it on that ground, although no damage be proved or sustained: *Addison* on Torts, 3rd ed., 139; *Nicklin v. Williams*, 10 Ex. 259.

The case of *Johnson v. Boyle*, 11 U. C. R. 101, determined that a private right of way might be consistent with a right of way for the public over the same ground.

It was further contended by defendant, that as O'Connor had a grant from the Crown only to the high water mark of the river, the plaintiff could claim no greater right

from him than he had. But O'Connor expressly granted the way to the water's edge of the river, so that, as against him and the defendant who takes from him, the plaintiff must be entitled to all the grant expressed, which was a right to follow the water line as it was for the time: *Stanton v. Windeat*, 1 U.C.R. 30; *Throop v. The Cobourg, &c., R. W. Co.*, 5 C. P. 509.

Then it was objected that the plaintiff failed to establish a title in Isaac Plumb, the younger, or in himself as his devisee, because the will was made on the 29th of March, 1847, and the deed to the devisor on the 15th of December, 1848, and this after acquired property did not pass; and *Whately v. Whately*, 13 Grant 436, S. C. 14 Grant, 430, was referred to at the trial by the defendant's counsel as an express decision in his favour: see Consol. Stat. U. C. ch. 82, sec. 11. The following cases are necessary to be considered in disposing of this point: *Cox v. Bennett*, L. R., 6 Eq. 422; *Wagstaff v. Wagstaff*, L. R. 8 Eq. 229; *Langdale v. Briggs*, 2 Jur. N. S. 35; *Re Midland R. W. Co.*, 34 Beav. 525; *Castle v. Fox*, L. R. 11 Eq. 542; *O'Toole v. Browne*, 3 E. & B. 572; *Lloyd v. Lloyd*, L. R. 7 Eq. 458; *Miles v. Miles*, L. R. 1 Eq. 462; *Hughes v. Hosking*, 11 Moo. P. C. 1; *Hance v. Truhitt*, 6 L. T. N. S. 19; *Jarman on Wills*, 1st Ed., 287-8; *Cushing v. Aylwin*, 12 Metcalf 169. In *Pray v. Waterston*, 12 Metcalf 262, it was held that the devise of the residue of the devisor's estate was indicative of an intention that all the testator's property which he had at the time of his death should pass. See also *Brimmer v. Sohler*, 1 Cushing 118; and *Loveren v. Lamprey*, 2 Foster's New Hampshire Rep. 434. Here the plaintiff claims under a residuary devise in the will.

But if the after-acquired property did not pass by the will, and the testator died intestate as to the land, still the plaintiff is entitled to recover, for the evidence shewed that Isaac Plumb, the younger, died without children about the year 1860, and that the plaintiff, who was his nephew, was one of his heirs-at-law; and if others should have



been joined with the plaintiff, their non-joinder is not a bar to the action: *Stedman v. Smith*, 8 E. & B. 1; *Cresswell v. Hodges*, 7 L. T. N. S. 70; *Addison* on Torts, 3rd ed., 350; *Skull v. Glenister*, 16 C. B. N. S. 81.

*Harrison*, Q.C., contra. The way in question is a public way; and whether public or private, a substantial obstruction must be shewn to entitle the plaintiff to recover: *Gale* on Easements, 393, 574; *Bolch v. Smith*, 7 H. & N. 736; *Corby v. Hill*, 4 C. B. N. S. 556; *Pickard v. Smith*, 10 C. B. N. S. 91; *Bailey v. Stevenson*, 12 C. B. N. S. 91; *Winterbottom v. Lord Derby*, L. R. 2 Ex. 316. Then, was the plaintiff owner of the land to which the way was claimed as appurtenant? At the trial he claimed title as devisee; and by this title he must stand or fall. *Whately v. Whately*, 14 Grant 430, is a direct decision against him, and establishes that after-acquired property does not pass by this will. *Castle v. Fox*, L. R. 11 Eq. 542, does not apply, for the English Wills Act is altogether different from ours. Moreover, the obstruction complained of was not, according to the evidence, in the way granted.

WILSON, J., delivered the judgment of the Court.

The way in question is plainly a private and not a public one. The expression contained in the deed from O'Connor to Isaac Plumb, the younger, "to use as a public highway or street" was not a dedication of the way to the public, but an illustration to what extent Plumb, the grantee, might use the easement granted to him. It was equivalent to a declaration that he might use it on foot, or with horses, carts, waggons, carriages, and all manner of vehicles, and for all purposes, without let or question, and free of all charge forever, just as if it were a public highway or street.

The act complained of, if on the way granted, must be an injury, and a cause of action to the plaintiff without the proof of actual damage sustained, because it was an abridgment of the easement, which if submitted to for a sufficient time will forever deprive him of the right to use as a way

the portion encroached upon: *Embrey v. Owen*, 6 Ex. 353; *Northam v. Hurley*, 1 E. & B. 665; and many other cases might be added.

It was said by the defendant that it was not on the way granted, because it was below high water mark, and that the right of way extended no further than to high water mark. The evidence as to its actual site, as affected by the low or high water mark, is not very clearly stated.

Mr. Burchall, a surveyor, said "A little water touched the south-west corner of the building. I don't think the other corners touched the water at all. \* \* The soil around the boat house was dry land; I don't know how high up the water came. I measured on the western side, and found it 177 feet from the highway to the river. I took the distance of 165 feet from the deed. \* \* I don't think the water can come up to the north end of the boat house \* \* I was not acquainted with high and low water on the St. Lawrence: could not speak as to high water mark."

The plaintiff said, "I don't think the water of the river would ever cover all the land where the boat house is at the present height of the water."

Ward Plumb said: "I don't think I ever saw the water the whole of the way up there, unless it was dashing up. \* \* I don't think the water was ever more than three feet further from the north end of the boat house than it is now."

Joseph Read, a witness for defendant, said: "There was a rock 10 feet north of the boat house, in parts four or five feet high. \* \* The water sometimes comes all over that ten feet of beach, and within a few feet of the rock."

David Read said: "The water came up higher on the land than the boat house. I have frequently seen it eight or nine feet higher than where the boat house stands now: that was several years ago."

The defendant said: "I have seen the water nine feet inside of the boat house, \* \* have seen the river five feet higher than now; it was so in 1857."

The evidence also shewed that Isaac Plumb, the younger,

built many years ago a wharf at his place, and that he used, as the plaintiff has done since Plumb's death, the way in question to get to and from his wharf.

No question was made on that point very especially at the trial.

The learned Chief Justice found "as a fact, that it does narrow the way by about ten feet, and to that extent is an obstruction if the party desire to use it, which as far as I see he has never done."

The evidence does not shew what the limit of the highest *ordinary* state of the river is, or was, as that would seem to be the proper limit of high water mark, and not the highest limit that the water reaches in the course of the year, for the great flow caused by the melting of the snow and ice, and by the spring rains, or by other unusual floods or causes, is to be excluded in determining the limit of high water mark. The true limit would appear to be, by analogy to tidal waters, the average height of the river after the great flow of the spring has abated, and the river is in its ordinary state: *Blundell v. Catterall*, 5 B. & Al. 268; *Attorney General v. Chambers*, 19 Jur. 779.

The evidence I think preponderates in favor of the plaintiff in that respect, as it shews the boat house, in part at any rate, was built rather above than below that line. But even if it did not, we should hold that O'Connor, and the defendant as claiming under him, were bound by the terms of the grant to Isaac Plumb "to the water's edge of the river," to extend the right of way that far wherever the water line was from time to time. O'Connor plainly intended to grant to that limit, because Plumb, his grantee, had his wharf erected in the river at that time and at that place, and it was necessary he should have access to it at all times, and at no time be precluded from reaching it by any intervening belt of beach which might happen to be left between high water mark and the lowest fall of the river.

There was another question of great importance argued by the parties respecting the validity of the devise from

Isaac Plumb to the plaintiff, upon which we are not obliged to give an opinion, because the case can be disposed of upon the other ground maintained by Mr. Richards, that if Isaac Plumb be held to have died intestate as to this land by reason of its having been acquired by him subsequently to the making of his will, still the plaintiff as one of his heirs-at-law is entitled to support this action in respect of his personal interest, as no plea of the non-joinder of his co-tenants has been pleaded by the defendant. In that view we concur.

Speaking for myself, I may say that I think the will must shew an intention on its face, or, in the language of the Act, that it "contains a devise in any form of words," to pass the real estate which the testator shall die seized or possessed of, in order to pass it.

The presumption under the Act of 1834 is, that the will does not pass after-acquired property. That presumption must be removed by some form of words indicating a contrary intention. These words are not here. No stress can be laid on the devise in question being of the residue of his estate, for in effect the devise of the residue is a specific devise.

In England, ever since 1837, and in our own province since 1869 (*a*), the presumption is just the other way, that the testator did intend and does intend to pass all his estate as he may have it or has it at the time of his death, unless the contrary intention appear by the will.

It is difficult, in my opinion, to get over the very positive language of the statute, and to place any other construction on it than was given to it by the majority of the Court in *Whately v. Whately*, 14 Grant 430. I have read my brother Mowat's able argument and opinion with much interest, and with a strong desire to concur in it from the liberality and reasonableness of his views; but the rule, which was peculiar to the law of England, which almost always defeated the intention of testators, and which had been disapproved of by many eminent Judges, still adhered to

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(*a*) By the 32 Vic. ch. 8, O.



our law, notwithstanding the Act of 1834. Nothing but some form of words expressing or indicating that the testator intended to devise the realty which he should die seized or possessed of at the time of his death, could avoid the operation of that rule.

We are of opinion the *postea* should be delivered to the plaintiff.

DRAPER, C.J. OF APPEAL.—I do not desire to add anything to the judgment of my learned brother, except upon the point of after acquired estate having been made devisable.

I shall not attempt to suggest reasons why our Legislature should not have expressed themselves on this subject in language of the same definite and clear character as the Parliament of Great Britain used when they subsequently dealt with the same matter.

Our Legislature has said that when the will of any person who dies after the sixth of March, 1834, contains a devise in any form of words of all such real estate as the testator shall die seized or possessed of, such will shall be effectual to pass any land that such testator may have acquired after the making of such will, in the same manner as if the title thereto had been acquired before the making of the will.

This enactment conferred a new power upon testators, and the intention to exercise it was to be expressed in some form of words which would sufficiently indicate that intention.

The English statute, on the other hand, dealt with the question in a different way. It created a new canon of construction of wills, as far as real estate was concerned, by enacting that the will, both as to realty and personalty, shall be construed to speak and to take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appear by the will.

To prevent the operation of the latter act, the testator must in and by his will manifest a contrary intention. To exercise the new power conferred by the former act the testator must express in some form of words that he in-

tends that any real estate acquired by him since the will was made shall pass under it. Our statute of 1834 does not of itself abrogate the old rule, but it empowers the testator to do so, and points out that his intention shall be expressed in some form of words, the sufficiency of which for the purpose must be left to the Courts. The statute has removed the obstacle which previously existed to disposing by will of real property not acquired at the date of the will.

I concur in the opinion already expressed, that a devise of "the rest and residue of my real estate" does not sufficiently express the intention that after-acquired lands shall pass. In fact, as has been observed, the testator must be held by these words to devise that which he has, not that which he has not, and by them he gives specifically all that he has, of which he had made no other disposition.

I agree, however, for the reasons given by my brother Wilson, that the postea should be delivered to the plaintiff.

MORRISON, J., concurred.

*Judgment for plaintiff.*

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### KAINS V. TURVILLE.

*Description of land—"Water's edge."*

P., owning land on both sides of a stream, conveyed a piece on the south side described as extending "to the water's edge of the creek, then keeping along the water's edge of said creek with the stream until," &c; reserving a road fifteen feet wide along the bank.

*Held*, to pass the land to the centre of the stream.

THE declaration stated that defendant on divers days and times broke and entered the lands of the plaintiff, being that part of lot one, in the eighth concession of Yarmouth, which form part of the bed of Kettle Creek, and lies between a line running down the centre of the creek and the southerly bank thereof, and between the bridge which crosses the creek near defendant's mill and the line between the

plaintiff's lands and the lands of James Stanton ; and dug holes in the said land, and carried away stones, gravel and earth.

*Pleas*, 1—Not guilty. 2. Land not the plaintiff's. 3. That at the time of the alleged trespass the land was the freehold of the defendant.

The trial took place at St. Thomas in September, 1871, before Gwynne, J., without a jury, who found for the plaintiff and one shilling damages.

The fact of the taking away the gravel was not disputed, for the defendant insisted on his right to do so, as he represented that it was his own land, and that he could not otherwise run a mill which he owned a little higher up Kettle Creek, the race way from which mill came into that creek on the north side. The plaintiff's land was on the south side of the creek, which was not a navigable stream. The defendant's land was opposite to it on the north side of the stream, and his mill was a short distance west of and higher up the stream than the plaintiff's land. The road mentioned in the deed hereinafter set out crossed the stream close to the mill.

For the purposes of the trial of this action it was admitted on both sides that Elthan Paul, who owned the land on both sides of the stream, and through whom both plaintiff and defendant claimed, was entitled in fee simple to the lands and premises mentioned in a deed from the said Paul and his wife to one Thomas Nicholson, containing seventeen and a quarter acres, more or less, being the south east part of lot number one in the eighth concession of Yarmouth, and also the bed of Kettle Creek bounding said land *usque ad medium filum*.

The deed referred to in this admission was dated 29th July, 1851, and conveyed to Thomas Nicholson in fee seventeen and a quarter acres, composed of the south-east part of lot one, in the eighth concession of Yarmouth, otherwise known as No. 46 south on Talbot road east in Yarmouth, described by metes and bounds. This description, after going to the west limit of the road which

crosses Kettle Creek, proceeded "then north along the west side of said road twenty-five links, more or less, to the water's edge of Kettle Creek; then keeping along the water's edge of said creek, with the stream, until the said creek intersects the line or limit between lots numbers forty-six and forty-seven south of said Talbot road; then south along the said line or limit fourteen chains, seventy-two links, to the place of beginning. Reserving and always excepting out of the above described premises a road of fifteen feet in width, along the bank of Kettle Creek on such ground along the highwater mark of said creek, on the southerly side thereof, and to be on such land or ground as a road can be reasonably made, and to extend from the east side of the said road laid out by the surveyor of highways to the limit between the lots as aforesaid, with free ingress, egress and regress as a public highway for all persons with their horses, waggons, cattle and carriages, that may require to use the same.

The plaintiff put in several deeds through and by which the seventeen and a quarter acres became vested in him in fee in the year 1859.

The trespass consisted in the removal of gravel from the bed of Kettle Creek at a place where, if the land conveyed to the plaintiff by the foregoing description extended to the middle of the stream, it belonged to the plaintiff; but, as the defendant asserted, if the plaintiff was limited to the edge of the water of the Creek, and did not own the bed to the middle thereof, then this action failed.

The defendant put in a conveyance from Elthan Paul dated 30th June, 1871, of all his estate, right, title, interest, claim and demand at law and in equity, to the bed of the stream (Kettle Creek) by a description which would embrace the *locus in quo*.

The gravel which the defendant was charged with removing appeared by the evidence to have been brought down the Creek when the water was raised by the thawing of winter snows or by heavy falls of rain, and seemed to have accumulated in the bed of the stream not very far below the



raceway, which, as stated by the defendant, would not carry off the water fast enough unless the accumulation was removed, and so the working of the mill would be materially impeded by back water. The defendant dug a trench, after this action was begun, for some distance, below the raceway, down the stream, and deepening it, which helped to take the waters off freely, and to which it did not appear the plaintiff had raised any objection.

There was very clear evidence that the defendant had removed gravel from a place which was on the south side of the centre line of the water, and the plaintiff endeavored to shew that it was removed at a place to which the water did not extend, but which was dry. The defendant, even admitting that his right, as he claimed it, was limited to the land covered by the water of the creek, endeavored to shew that he had not exceeded it; but the point really in dispute between the parties was, whether the plaintiff's title under the deed of the 29th July, 1851, extended beyond the water's edge of Kettle Creek, to which the defendant insisted he was limited.

A verdict was entered for the plaintiff with one shilling damages, leave being reserved to defendant to move to set it aside, and enter a verdict for defendant.

*Harrison*, Q.C., obtained a rule *nisi* accordingly.

*C. Robinson*, Q.C., and *Moss* shewed cause. The plaintiff is clearly entitled to recover. First, the evidence shews that gravel was taken on the south side of the stream where it was dry, and there can be no question that he is entitled to the water's edge, as a shifting boundary, wherever it may be at the time: *Throop v. Cobourg and Peterborough R. W. Co.*, 5 C. P. 509, 527-8; *Buck v. Cobourg and Peterborough R. W. Co.*, *Ib.* 552; *Scratton v. Brown*, 4 B. & C. 485, 498; *Parker v. Elliott*, 1 C. P. 470, 480, 489-90; *Child v. Starr*, 4 Hill. 375-6. (a)

The more important question, however, is whether the

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(a) See also *Plumb v. McGannon*, ante p. 14.

plaintiff is entitled to the water's edge only, as the defendant contends, or to the centre of the stream. On this ground, also, the plaintiff must succeed. It will be urged that by conveying to the water's edge, and then keeping along it, the grantor sufficiently shews an intention to confine the land to the margin of the stream, and to exclude the general rule, which *prima facie* entitles the proprietor of land on a stream to go to the centre. This, however, is not the law. The cases in England appear to be uniform, and in the United States, though the decisions are somewhat conflicting, the weight of authority is clearly in the plaintiff's favor. The rule to be deduced is, that where the deed so describes the land as to make it touch the water, one-half of the bed of the stream is included by construction of law, as an appurtenance; and to exclude this construction there must be an express exception or reservation of the bed; nothing less will be effectual: *Bickett v. Morris*, L. R. 1 H. L. Sc. App. 47; *Berridge v. Ward*, 10 C. B. N. S. 411; *Lord v. Commissioners for Sydney*, 12 Moo. P. C. 497; *Luce v. Carley*, 24 Wend. 451; *Robinson v. White*, 42 Maine R. 210; *Bradford v. Cressey*, 45 Maine R. 9; *Ex parte Jennings*, 6 Cowen 528, 549, note; *Angell on Water-courses*, secs. 23, 29, 53; 3 *Kent Com.*, 11th ed., 429, 541, 547. [MORRISON, J., referred to *In re McDonough*, 30 U. C. R. 288.]

*Harrison, Q.C.*, contra. The general rule, by which land upon a stream extends to the centre, is a rule of evidence, not of construction: *Rex v. Inhabitants of Landulph*, 1 Moo. & Rob. 393; *Holmes v. Bellingham*, 7 C. B. N. S. 329; *McCannon v. Sinclair*, 2 E. & E. 53; *Regina v. Board of Works for the Strand District*, 4 B. & S. 526; *Howard v. Ingersoll*, 13 Howard 381; *Best on Evidence*, 4th ed., 536-8; *Carter et al. v. Murcott et al.*, 4 Burr. 2162. The ordinary presumption of conveyance to the centre may be rebutted by the deed itself: *Headlam v. Hedley*, Holt N. P. C. 463; *Grose v. West*, 7 Taunt. 39; *Cooke v. Green*, 11 Price 739; *Duke of Somerset v. Fogwell*, 5 B. & C. 875; *Doe Harrison v. Hampson*, 4 C. B. 267; *Marquis of Salisbury v. Great*

*Northern R. W. Co.*, 5 Jur. N. S. 70; *Regina v. Inhabitants of Edmonton*, 1 Moo. & Rob. 24. Here the intention to stop at the water's edge is apparent from the fact of the conveyance being to that point only, instead of to the creek, as would otherwise have been the expression used. There is nothing in this deed to shew an intention to convey to the centre of the stream; and the presumption from all the facts is the other way. Paul, the grantor, owned the land on both sides of the stream; the mill was there; and his idea was to convey the land to the bank only, reserving the stream. Besides, the removal of the gravel was necessary to enable the defendant to run his mill, which was being stopped by the accumulation, and he had no other means of abating the nuisance. He cited *Angell* on Tide Waters, 7; 29-30 Vic. ch. 51, sec. 280; 31 Vic. ch. 30, sec. 29, O.; 34 Vic. ch. 30, sec. 14, O.; *Roberts v. Rose*, L. R. 1 Ex. 82.

DRAPER, C. J. of Appeal, delivered the judgment of the Court.

The law is too well settled to require any extended reference to authorities to establish the rule, that in streams and rivers which are not navigable a description of land which extends to the water's edge, or to the bank, carries the grant or conveyance to the thread of the stream; and that the description continuing along the water's edge, or along the bank, will extend along the middle or thread of the stream, unless indeed there be some words forming part of the description, or introduced by way of exception, which clearly excludes whatever may lie between the water's edge, or the bank, and the *medium filum aquæ*. I will only refer to two authorities, one English, the other American.

In *Wright v. Howard* (1 S. & S. 90) Leach, V. C., says: "*Primâ facie* the proprietor of each bank of a stream is the proprietor of half the land covered by the stream." In *Tyler v. Wilkinson* (4 Mason 400) Story, J., says: "*Primâ facie* every proprietor upon each bank of a river is entitled to the land covered with water in front of his bank, to the middle thread of the stream."

Applying the rule thus enunciated to the description contained in the deed of 29th July, 1851, Paul to Nicholson, the result must be in the plaintiff's favor, for that description carries the boundary to the water's edge of Kettle Creek; "then keeping along the water's edge of the said creek, with the stream, until the said creek intersects the line" between Nos. 46 and 47.

It may also be noticed that this deed contains an exception of an easement over part of the land granted, but not a word of exception which would take the case out of the operation of the rule above mentioned.

The rule must be discharged.

*Rule discharged.*

### BOOTH V. GIRDWOOD.

*Ejectment—Notice under Consol. Stat. U. C. ch. 27, sec. 17.*

Land sold for taxes under C. S. U. C. ch. 53, was described in the assessment roll, advertisements, and treasurer's warrant, as the south part of the west half of lot 17, in the 9th concession of Rawdon, 75 acres; and in the sheriff's deed by metes and bounds. *Held*, that according to *Knaggs v. Ledyard*, 12 Grant 320, and *McDonell v. McDonald*, 24 U. C. R. 74, such description was insufficient.

*Wilson, J.*, but for these decisions, would have held the description sufficient, as meaning the south 75 acres of the west half.

The plaintiff in ejectment claiming through this sale, and being a *bonâ fide* purchaser, gave defendant a notice, under sec. 17 of the Ejectment Act, C. S. U. C. ch. 27, requiring him to prove his title. *Held*, that the defendant, upon the evidence set out below, was a mere intruder: that the case was within the statute; and that defendant could not take advantage of the defective description.

Such a defect would not be cured by the 27 Vic. ch. 19, sec. 4, or by the 29-30 Vic. ch. 53, sec. 156, or the 32 Vic. ch. 36, sec. 155, O.

EJECTMENT for the south part of the west half of lot 17, in the 9th concession of Rawdon, containing 75 acres, of which the abutments were set out.

The plaintiff claimed title by deed to himself, dated 19th December, 1868, from Barnabas W. Lane, who claimed by deed from Peter W. Merritt, dated 7th March, 1867, who purchased at a sale for taxes.

The plaintiff also gave notice that he claimed the premises as the *bonâ fide* purchaser from Barnabas Lane, and that the defendant would be required to shew upon the trial of the



cause what legal right he had to the possession of and by what title he held the premises, and if he would abandon further claim to the same, and not use, possess, or occupy the same, and allow the plaintiff peaceably to hold and occupy the same.

The defendant appeared and defended for the whole.

The cause was tried at the last Spring Assizes at Belleville, before Morrison, J.

The deed from the sheriff to Peter W. Merritt, dated 23rd March, 1866, was proved.

The Sheriff said: I had a warrant (which was afterwards produced) for the sale of the land. The land was advertised in the "Gazette," and in a local paper. (It was admitted the sale was advertised from the 20th August, 1864, to the 12th November, 1864, both inclusive. Defendant's counsel contended that it required the insertion of the 19th and 26th November. Also admitted that the advertising in the local paper was regular, and that a notice under the Ejectment Act was served.) I am satisfied the notice of sale was put in the court house. I made the regular entries in my books of the sale of this land.

In cross-examination he said: We instruct the purchasers to get the metes and bounds made by a surveyor. I would and did put up the land for sale as it is described in the "Gazette." Many months after the sale the purchaser got the metes and bounds made by a surveyor. He brought it to me, and I inserted it in the deed. The "Gazette" has the lot as described in the warrant. In this case the whole lot was sold for the taxes, not a part.

The land to be sold was described in the *Gazette* as

Lot.	Concession.	Acres.
S. pt. of W. $\frac{1}{2}$ 17,	9,	75.

The assessment roll and Treasurer's warrant gave the same description. The Sheriff's deed described the land by metes and bounds.

*Barnabas Lane* proved the deed from Peter W. Merritt to the witness, dated 7th March, 1867, and the deed from witness to the plaintiff, dated 19th December, 1868. He

said, I have conversed with the defendant about the land. He did not claim it. He said that Merritt would not sell. I was in the Court at the time. I asked what land he had, he said twenty-five acres. He pointed out to me where the land came to; he did not pretend to have any claim to the seventy-five acres. This was three years ago.

In cross-examination he said: I gave Merritt \$100 for the land, and sold it for \$110.

*Francis McAnnany* said: I am treasurer of the county. The lot was returned in arrear from 1857 to 1864 inclusive, (defendant did not require to see the books); the lot was sold for the taxes due on it from 1857 to 1863.

In cross-examination he said: There were no taxes for 1862 against it. In 1863 it was returned the north east 75 acres. In 1864 and 1865, the west part of the west half, seventy-five acres, was returned in arrear. These taxes were paid afterwards. The land was all returned as non-resident land during the whole period.

*Thomas Ovens* said: I knew the lot before 1864, and have lived close to it for twenty years. Never knew any person living on it.

Several exceptions were taken to the plaintiff's case, which are stated in the rule *nisi* hereinafter set out.

For the defence *James Girdwood* said: I am defendant. I live on the west half of 17, in the 9th concession of Rawdon; have lived there seventeen or eighteen years.

I bought it from James Ross for \$200. I went on the lot about a year after; live on the rear of it; have always paid my taxes since then. I have occupied the whole of the west half since 1857, and have paid taxes all that time. I live on the south part of the lot. The south part is in woods; have made sugar there between 1857 and 1861. I got firewood there, and on the adjoining vacant lot. I prove John Brook's signature to a receipt as collector.

In cross-examination he said: I look at an assessment paper; the figures are not altered. I swear I purchased the west half of the lot from James Ross. I made sugar on the seventy-five acres six or seven years ago. The

whole one hundred acres are not fenced. I don't remember telling the assessor not to assess me for the seventy-five acres in 1863. I gave that part in to be assessed. I always claimed the west half; never saw it advertised for taxes. Mrs. Huff did not read to me out of any paper that it was advertised for taxes, and I consider and have no doubt I paid the taxes for the whole 100 acres in 1864 and 1865 to Henry Matthews.

*John Howken* said: I live in the 11th concession of Rawdon, about two miles from this land. I knew of defendant going on the lot seventeen or eighteen years ago. I cant say what he had of it; some said twenty-five acres, some fifty, and he said he had the half. I never saw him doing anything in the woods or on the place.

In reply, *Henry Matthews* said: I know defendant. I was collector in 1864 and 1865. I collected taxes from defendant for, I think, twenty-five acres. He was assessed for twenty-five acres, and he only paid for that quantity. The seventy-five acres were not on the collector's roll for that year. I look at the receipt spoken of by defendant for 1865; in that year defendant only paid for twenty-five acres. I was collector for 1863, 1864, and 1865.

Mrs. *Huff* said: I know defendant. He was assessed in 1863 in my house for twenty-four or twenty-five acres. The assessor asked what he could do with the seventy-five acres; he said he could do as he liked, he had nothing to do with them. The assessor then said he would return it as formerly, "non-resident." On one occasion I was reading the Belleville paper in his house, about lands sold for taxes. I drew his attention to the seventy-five acres being advertised in August, 1864; he said he did not care what they did with it. I lived near there fifteen years. The seventy-five acres were unoccupied and wild, and I never heard him claim the land as his. I live quite close to him. I heard him swear to-day he was assessed in 1863 for the seventy-five acres. That is not true. His character is a very bad one for truth.

In cross-examination she said: I never heard that he made sugar in these woods, or anything else. I live on the

next lot. I think he told me he purchased twenty-five acres from Ross.

*Thomas Ovens* said: I heard defendant say he only bought twenty-four acres from Mr. Ross, and I remember him shewing the paper he got from Mr. Ross for the twenty-four acres. Mr. Ross offered to sell me the same twenty-four acres.

In cross-examination he said: About sixteen years ago I saw Mr. Ross's receipt for the twenty-four acres.

The defendant's counsel renewed his former objections, and a verdict was found for the plaintiff.

In Easter Term last *S. S. Lazier* obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered, or a verdict for the defendant, pursuant to leave reserved, on the following grounds:

1. The sale of taxes on which the plaintiff relies was not long enough nor sufficiently advertized in the *Gazette*.

2. The description of the land in the warrant and advertisement, and as put up for sale and sold, was bad and illegal, for uncertainty as to the land assessed and to be sold; and such description was not the same as in the deed from the sheriff.

3. It was not shewn the land was properly assessed.

4. It appeared the land was not properly assessed.

5. The return to the treasurer was not correct, as required by the assessment law.

6. The warrant and the advertisement do not distinguish between lands which have been granted in fee and those which were under a lease or license of occupation, and of which the fee still remains in the Crown.

7. Neither the warrant nor the advertisement distinguish between taxes and costs, nor was any such distinction made at the sale.

In this Term *Burdett* shewed cause. 1. As to the objections to the advertisement, *Connor v. Douglas*, 15 Grant 456, disposes of them. 2. The land was assessed



as non-resident land, and was described as the south part of the west half of 17 in the 9th concession, seventy-five acres. The same description was in the advertisement and warrant. The description was sufficient according to the statute, Consol. Stat. U. C. ch. 55, sec. 31, sub-secs. 2, 3: *McDonald v. McDonell*, 24 U. C. 74. The sheriff may search the registry office for the purpose of getting a correct description, but he need not insert more than has been done in the advertisements, nor need more be contained in the warrant than is there. This defendant was served with a notice under the 17th section of the Ejectment Act to shew his claim, as he is in possession without any title, and he is precluded from taking these objections: *Davis v. VanNorman*, 30 U. C. R. 437. The third and fourth objections mean that the land was not properly assessed: that it should not have been assessed as "non-resident" land; but the evidence shewed it was rightly assessed in that respect. The fifth objection cannot be supported: *Allen v. Fisher*, 13 C. P. 63. The sixth objection is untrue in fact: *Brooke v. Campbell*, 12 Grant 526. As to the seventh objection, ch. 55 sec. 124 requires the amount of costs and of taxes to be joined; but that is directory only: *Cook v. Jones*, 17 Grant 488. This sale was since the 27 Vic. ch. 19, sec. 4, and having been openly and fairly conducted, and there having been five years arrears of taxes upon the land, and no redemption having been made within the year, is now final and binding on the owner, and much more is it against this defendant, who is a mere squatter.

*Dickson* supported the rule. The first objection cannot be supported against the decision referred to. 2. The description of the land is not sufficient: *Fraser v. Mattice*, 29 U. C. R. 150; *Cayley v. Foster*, 25 U. C. R. 405; *McDonell v. McDonald*, 24 U. C. R. 74; *Knaggs v. Ledyard*, 12 Grant 320; *Grant v. Gilmour*, 21 C. P. 18. The third and fourth exceptions are, that the assessments describe the land in the same faulty manner that it was described in the warrant and in the advertisement; and

the "south part of the west half of 17 in 9th concession, containing seventy-five acres" is not a sufficient description of the particular seventy-five acres: Consol. Stat. U. C. ch. 55, secs. 19, 140; *Allen v. Fisher*, 13 C. P. 63; *Connor v. Douglas*, 15 Grant 456. This defendant was not a mere squatter, and so the notice under section 17 of the Ejectment Act, and the case of *Davis v. VanNorman* do not apply. The plaintiff has no title except under the tax sale, and that the defendant must be allowed to attack.

WILSON, J., delivered the judgment of the Court.

The only objections we have to deal with are the second, third, and fourth. The others were either given up or not supported on the argument.

We may here observe that no leave to move to enter a nonsuit or verdict appears on the learned Judge's notes; but we presume the parties understood there was such leave given, as no objection was made to the nature of the motion on the argument.

This case must also be considered with respect to the ejectment notice served on the defendant under the 17th section of the Ejectment Act, treating him as a mere intruder, and a mere stranger to the title having no claim or colour of legal claim to the possession, as against the plaintiff, who it is said had just claim to the land, and so excluding the defendant from taking advantage "of some want of technical form in the plaintiff's title, or some imperfection not affecting the merits of his case."

We think it was proved satisfactorily that the defendant was a mere squatter: that he never made claim to the land in question: that he never paid taxes upon it; and that he never had possession of it, more than by setting up some vague title to it but lately, by reason of his having some years ago purchased the other twenty-five acres of the same half lot; and we think it should be considered that the plaintiff upon the evidence was and is a person who had and has just claim to the land.

The second objection applies to the description of the land. In the assessment roll for 1860 it was described

among the non-resident lands as "9th concession, south part of west half, lot 17, acres 75."

In the *Belleville Intelligencer* of 19th August, 1864, it is described in the same way, and also in the *Canada Gazette* of the 20th of August, 1864, and the 12th November, 1864, all of these being the sheriff's advertisements of the land for sale. The treasurer's warrant to the sheriff dated the 13th of August, 1864, gives also the same description. The sheriff's conveyance to the purchaser describes the seventy-five acres by metes and bounds.

The cases referred to on this point are *Fraser v. Mattice*, 19 U. C. R. 150, in which the land sold by the sheriff was described as "thirty acres of lot number 15 in the 7th concession of the township of Osnabruck, to be measured according to the statute in that case made and provided," which was held sufficient, because the 6 Geo. IV. ch. 7. directed in what manner the land was to be described.

In the same case a sheriff's deed was held to be insufficient which described the land as "composed of twenty-five acres of lot number 15 in the 7th concession of Osnabruck."

*Cayley v. Foster*, 25 U. C. R. 405, is precisely the same as the last sheriff's deed mentioned in the preceding case: "twenty-five acres of lot 31 in the 12th concession of the township of King," and the same decision was come to, that it was insufficient.

In *McDonell v. McDonald*, 24 U. C. R. 74, the sheriff's deed described the land thus: "89 acres of the south part of the east half of lot number 25 in the second concession of the township of Charlottenburgh." The description was held insufficient, the statute, the 13 & 14 Vic., ch. 67, sec. 53, requiring the deed to "describe the land by its situation, boundaries, and quantity."

In *Knaggs v. Ledyard*, 12 Grant 320, a sale by the sheriff of "the west part of lot No. 31, in the second concession of the Township of Enniskillen; that is to say, 185 acres thereof," the lot containing 200 acres, was held invalid; which case was affirmed in appeal on the 25th of August, 1868 (a).

In *Grant v. Gilmour*, 21 C. P. 18, the only description of land given in the *Canada Gazette* and in the treasurer's warrant was, "pt. of S. pt. 111, 1st con. Tay, 40 acres," and it was held this could not be supported.

The evidence shews the land was sold for arrears of taxes due on it from 1857 to 1863, but not including, as I understand it, the year 1862. The warrant to sell was issued on the 13th of August, 1864,

The sale was therefore under the Consol. Stat. U. C. ch. 55.

The assessment roll should shew "the description and extent or amount of property assessed against each;" and also "the number of concession, street, square, or other designation of the local division in which the real property lies:" sec. 19.

By section 31 the lands of non-residents shall, if not known to be subdivided into lots, be designated by the boundaries, or other intelligible description: sub-sec. 2; see also sub-sec. 3.

These provisions and the nature of the proceeding shew and require that the property to be affected should be so described that the particular property may be known by some designation, or by boundaries, or in some other intelligible manner. The want of that proper description may invalidate the sale altogether.

The treasurer followed the same description in his warrant, and the sheriff in his advertisements.

By section 140 the sheriff should know "distinctly what part of the land" he is to sell, for he is to give "a certificate under his hand to the purchaser stating distinctly what part of the land, and what interest therein have so been sold, or stating that the whole lot or estate has so been sold, and describing the same."

The sheriff, if unable to give sufficient description of the land sold by him, may ascertain it by a search in the Registrar's office: sec. 146.

And he shall enter in a book for the County Council a full description by metes and bounds of every parcel of land conveyed by him to purchasers: sec. 153.



All these enactments indicate that the land taxed and to be sold, and sold, is required to be sufficiently identified by some intelligible description. The question then is, has that been done?

No doubt the sale of "twenty-five acres of a lot" must be bad, for that may mean any part of the 200 acres. As to the "eighty-nine acres of the south part of the east half," if that description mean *the south eighty-nine acres*, I should say it would be a good description; just as good as the south half, or the north-west quarter of a lot, which is a mode of description in every-day use. But I think it does not mean the same thing.

Then "the west part of a lot, comprising 185 acres," if that mean *the west 185 acres* of the lot, I should say that also would be a good description; and I confess I do not see the distinction between the west part of a lot, comprising 185 acres, and the west 185 acres of a lot.

The former of these expressions was held void for uncertainty in appeal by six to two of the Judges. I was one of the majority. I am not satisfied now I was correct. I should not now form the same opinion. In my opinion these expressions are equivalents.

Then the words "part of the south part of a lot, 40 acres," I should say did not plainly express that it was *the south forty acres* of the lot which were referred to.

The words in the present case are, the "south part of west half, acres 75." Do these words mean *the south 75 acres of the west half*? I think they do; and that they may be read so; and that they should be read so if it be possible to do it. It is better to sustain this public sale, and the preceding acts of the assessor, the collector, the county treasurer, the sheriff, and the township and county municipalities, than to defeat them. And it is better to sustain the purchase made by the purchaser at the tax sale, who has paid the debt upon the land to the public authorities, and who has taken his title in good faith and transmitted it to others, and which is now vested in the plaintiff, than to avoid it.

But this cannot be done while *Knaggs v. Ledyard* stands as a binding decision. It is the one which has gone the furthest in that direction.

We think the 27 Vic. ch. 19, sec. 4, cannot apply here, because the objection is one which is fatal to the deed, by reason of the want of identity and certainty of the subject or land which was to be and which was sold. We think, for the same reason, the acts 29–30 Vic. ch. 53, sec. 156, or the Ontario Act, 32 Vic. ch. 36, sec. 155, cannot be made to apply.

I have referred to these cases and observed upon them for the purpose of shewing that there may well be a difference of opinion among the Judges, respecting the construction to be placed upon the description in question; and that if the defendant, a mere squatter, can put forward so critical an objection, I do not know what possible difference there can be on any trial between those objections which the owner or former owner may raise, and those which a mere squatter may take.

It is quite plain that the sale in question, in face of *Knaggs v. Ledyard*, must fail in the ordinary course of a contentious suit.

The question is, can the plaintiff, nevertheless, recover against the defendant, who is a mere squatter, by reason of the 17th section of the Ejectment Act, Consol. Stat. U. C. ch. 27, and the notice which he has served on the defendant under it?

That section declares that, "It being desirable in actions of ejectment brought against persons who are merely intruders, not to prevent claimants from recovering land to which they have just claim on account of some want of technical form in their title, or some imperfection not affecting the merits of their case, and of which mere strangers to the title having no claim or color of legal claim to the possession should not be permitted to take advantage; the claimant or his attorney in any action of ejectment may serve a notice," &c.

This defendant is, as I have already stated, a mere intruder, &c., and the claimant is a person who has *just*

*claim* to the land : that is, some title to the land short of a legal title—a title which but from the want of some technical form, or some imperfection not affecting the merits of the case, would be a good title.

If, for instance, in the deed from a married woman and her husband the certificate of her having executed the deed voluntarily, &c., were imperfect, so as to be void as against her at law, that would, if remediable in equity, be a case which I suppose would be within the statute.

So if no certificate at all had been given, and the married woman and her husband, or any one claiming under them, were not disputing it, that too would, I think, be a case within the statute.

So if one were to execute a conveyance, but by an oversight were to omit to put a seal to it, that too would, it appears to me, be a case within the statute, so long as the grantor or any one under him were not disputing the conveyance.

In these cases I am assuming of course that a full consideration has been given by the purchaser, and that he has acted in entire good faith.

It is true these imperfections cannot rightly be said *not* to affect "the merits of the case" in one sense. They do affect the legal rights, and in that sense the legal merits too, because the conveyances are utterly void at law by reason of them. Still if the grantors do not question the conveyances of those who have dealt honestly with them, and who have a *meritorious* claim upon and against them to be maintained in the possession, why should a mere "intruder" be allowed to do so? The words of the Act are very forcible as to them; "and of which" (want of technical form or imperfection, &c.) "mere strangers to the title having no claim or colour of legal claim to the possession *should not be permitted to take advantage.*"

Now considering the technical nature of the objection, although a fatal one, to the legal title of the claimant, if raised by some one having title—the fact that the purchaser at the tax sale was a *bonâ fide* purchaser—

that it was a public sale, and to acquit a public debt with which the land was justly burdened, and that the claimant is a *bonâ fide* purchaser under him—that they have both paid the consideration money for a valid title—and that neither the owner nor any one claiming from him, nor any other person whatever who has a claim or colour of legal claim to the land, is disputing the tax title such as it is, but a mere intruder, and a mere stranger to the title, who has no claim or colour of claim to it—We think the statute may very justly be applied with the full force of this very beneficial enactment against him.

Perhaps it may not be quite easy to say in what cases the statute should be held to apply against persons who are mere intruders and strangers to the title, and in favour of those who may have the necessary claim to constitute a just claim within the meaning of the Act.

In *Doe dem. North v. Webber*, 3 Bing. N. C. 922, 928, the Chief Justice, in speaking of the plaintiff's title, which was merely an equitable one, it being a copyhold, and there having been no surrender to the lord of the manor, speaks of that serious defect as having *no bearing on the merits of the case*; and he therefore granted a new trial, to enable the plaintiff to supply the defects before another trial.

After a judgment by default the defendant is admitted to plead only upon an affidavit that he has a good *defence* to the action on the merits. Mere merits will not do; it must be stated that they constitute a *defence to the action*.

Under this statute it is *the merits* which are made the important matter, for the plaintiff is permitted to recover although he has not a perfect cause of action. The object is to exclude strangers from questioning his title unauthorisedly.

The policy of the old law was to prevent strangers from buying choses in action, or disputed titles, and litigating that which the assignors or vendors could not litigate.

A person may justify under an irregular writ, for it is good as long as it stands. A stranger, and even bail were considered as strangers, are not allowed to complain of an



irregularity to the *capias* against their principals: *Gurney v. Hopkinson*, 5 Tyr. 212; see, also, *Shepherd v. Thompson*, 9 M. & W. 110. Nor can any one bring error but one who is a party or privy to the record, or who is injured by the judgment. Bail cannot have error on the judgment against the principal, nor the contrary: *Ch. Arch. Prac.* 11th ed. 548.

In any way of viewing this case the defendant should not be allowed to intervene between the plaintiff and the owner, and to contest rights which he does not represent.

We are therefore of opinion the rule should be discharged.

*Rule discharged (a).*

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## PORT WHITBY AND PORT PERRY RAILWAY CO. v. THOMAS DUMBLE.

*Contract to build railway—Independent covenants—Principal and surety—Substituted agreement—Reservation of remedies.*

Declaration upon defendant's bond, conditioned for the performance by one D. of his agreement, under seal, to construct a railway for the plaintiffs, to be completed by the 15th February, 1871, or within such further time as might be allowed; first breach, failure to complete by the 15th February; second breach, failure to complete within the extension of time allowed.

Plea to the first breach: that by the agreement the plaintiffs promised to pay D. for the works \$290,000, of which \$100,000 was to be paid in mortgage bonds of the plaintiffs, and the rest as specified, but ten per cent. was to be retained out of each payment of bonds until the completion of the work, and then to be paid with the last payment; and that although the plaintiffs made certain payments according to the contract, they failed to make the residue, whereby D. was and is prevented from completing the work.

*Held*, plea bad, for the covenants were independent, and non-performance by the plaintiffs was no defence.

Equitable plea to second breach: that during the extension of time the plaintiffs, with D.'s consent, agreed in writing with one E. that E. should complete the contract between D. and the plaintiffs, with such changes as the plaintiffs and E. should agree upon; and thereupon D. abandoned the contract, before any breach thereof, and left the works, which E. took possession of.

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(a) See *Thompson v. Hall*, 31 U. C. R. 367.

Replication : that by the agreement with E. it was expressly stipulated that all the plaintiffs' rights and remedies against D. and defendant as his surety, for the non-performance of D.'s contract, should be reserved.

*Held*, replication bad ; for the contract with D. being abandoned before breach there could be no remedies upon it to reserve :

*Held*, also, no objection, in equity, that the new agreement with E. was not under seal.

DEMURRER. Declaration on a bond, dated 18th October, 1869, made by defendant in the penal sum of \$50,000, to secure the performance by John Henry Dumble of an agreement dated 14th September, 1869, made by him with the plaintiffs to construct a railway from the town of Whitby to Port Perry on Lake Scugog ; the railway to be completed and delivered to the plaintiffs on or before the 15th of February, 1871, with a provision for such extension of time as should appear just and reasonable if the plaintiffs should not be able to procure the right of way as fast as might be required for the work. First breach : that J. H. D. failed to build and complete the works, and to deliver them to the plaintiffs in complete running and working order, on or before the 15th of February, 1871. Second breach : failure to complete the work within the extension of time allowed, by reason of the plaintiffs' inability to procure the right of way as fast as it was required for the works, beyond the 15th of February, 1871, for a just and reasonable period.

Fifth plea : that in and by the said agreement between the plaintiffs and the said J. H. D., duly sealed with the seal of the plaintiffs, it is provided that, in consideration of the agreement therein contained on the part of the said J. H. D. and of the works thereby covenanted, contracted for and agreed to be completed by the said J. H. D., the plaintiffs did thereby promise and agree to pay to the said J. H. D. \$290,000, as follows : the sum of \$163,000 in cash and municipal debentures, \$100,000 in first mortgage bonds of the Company, &c., and \$27,000 in paid up stock of the Company, to be paid at the times and in manner in the said agreement specified ; provided, however, and it was thereby agreed, that it should be lawful to and for the

plaintiffs to withhold and retain from the said J. H. D. ten per cent. of the amount specified to be paid in bonds, on every payment of bonds, for and until the completion of the said works, and the due fulfilment of the said contract to the satisfaction of the Company, and the acceptance thereof by the said plaintiffs, which said sum of ten per cent. should be out of and form part of the amount therein specified to be paid in bonds, and should be paid over to the said J. H. D. with the last instalment of the said payments, on the certificate of the President or Managing Director that the work had been completed satisfactorily, and in accordance with the said contract. And the defendant alleges, that although the plaintiffs made certain of the said payments in accordance with the said contract, yet they wholly failed and made default in the residue of the said payments, and did not pay the same to the said J. H. D. in accordance with the terms of the said contract, although the days and times appointed for payment thereof had expired long before the commencement of this suit, and before any breach of the contract by the said J. H. D.—whereby the plaintiffs broke their said contract and agreement, and are not entitled to maintain this suit; and by reason of such default by the plaintiffs the said J. H. D. hath been prevented from completing, and is unable to complete the said railway at the time specified, or at any time since, and before the commencement of this suit.

Sixth plea, to the second breach, on equitable grounds: that during the said extension of time in that breach mentioned, and before any breach of the said agreement in that breach mentioned, the plaintiffs, with the consent of the said J. H. D., agreed in writing with one Caleb E. English that the said Caleb E. English should finish and complete the said contract and agreement so made between the plaintiffs and the said J. H. D., with such alterations and variations therein as the said plaintiffs and Caleb E. English should agree upon; and thereupon the said J. H. D. gave up and abandoned the said contract and agreement before any breach thereof; and the plaintiffs and the said Caleb E.

English agreed that the said railway should be completed by the first day of September, 1871, and the said J. H. D. left and abandoned the said works on the said railway, and the said Caleb E. English entered upon and took possession of the same, and continued the said works, by and with the consent of the plaintiffs, from thence hitherto.

Third replication to the sixth plea: that in and by the agreement last mentioned it was, among other things, expressly stipulated that all the rights and remedies of the plaintiffs against the said J. H. D. and the defendant as his surety, for any claim of the plaintiffs against either of them for damages for non-performance by the said J. H. D. of the contract made by him with the plaintiffs, should be reserved; and that nothing therein contained should be taken in any way to prejudice the rights of the plaintiffs as to any claim against the said J. H. D., or the defendant, for damages on account of non-completion of the contract of the said J. H. D.

Demurrer to the fifth plea, on the grounds—1. The covenant of the plaintiffs in the said plea set forth is an independent covenant, and not a dependent covenant, as in and by the said plea supposed. 2. The non-performance of any of the plaintiffs' covenants affords no sufficient answer or excuse for the non-performance of the covenant of the said J. H. D.

Demurrer to the third replication to the sixth plea, on the ground that, notwithstanding the stipulation in the said replication alleged, the defendant is discharged and released by the matters in the said plea alleged.

*Harrison, Q. C.*, for the plaintiffs. The fifth plea is bad. The payment by the plaintiffs is not a condition precedent to the doing of the work, but the covenants are independent. The question in such cases is, what was the intention of the parties to be gathered from the whole agreement. Here the contract is not set out in full, but it is stated that the plaintiffs' promise to pay was made in consideration of the promise of D., the principal, to do the work, which



shews the covenants to be independent; and the rule is so to construe them in case of doubt. Here, too, for all that appears, a very large amount may have been paid by the plaintiffs; the defendant has therefore received part of the consideration for his promise, and he cannot set up non-payment of the balance as a defence. The cases on this subject are very numerous, and each must depend upon its own circumstances. Among the leading authorities are *Pordage v. Cole*, 1 Saund. 319 *l*; *Boone v. Eyre*, 1 H. Bl. 273, note *a*; *Macintosh v. Midland R. W. Co.*, 14 M. & W. 548; *Mattock v. Kinglake*, 10 A. & E. 50; *Stavers v. Curling*, 3 Bing. N. C. 355; *Sibthorp v. Brunel*, 3 Ex. 826; *Newson v. Smythies*, 3 H. & N. 840; *London Gas Light Co. v. Vestry of Chelsea*, 8 W. R. 416; *Philadelphia, &c., R. W. Co. v. Howard*, 13 Howard 307.

The replication to the sixth plea is sufficient. It shews that the remedies against the original contractor, Dumble, and his surety were reserved with Dumble's assent. It was not necessary that he should be a party to the agreement; his assent was sufficient. The plaintiffs could have insisted on Dumble going on with the work, and English was to stand, as it were, in his place. The reservation might be before breach: *Cowper v. Smith*, 4 M. & W. 519; *Davidson v. McGregor*, 8 M. & W. 755; *Union Bank of Manchester v. Beech*, 3 H. & C. 372, 12 L. T. N. S. 499. Moreover, the contract between English and the plaintiffs was not under seal.

*J. H. Cameron*, Q. C., and *Hector Cameron*, contra. As to the replication. No doubt when a creditor reserves his rights against a surety the latter is not discharged, though the dealing with the principal may be such as would otherwise have that effect. The cases are reviewed and the principle is established in *Owen v. Homan*, 4 H. L. Cas. 997. But this can have no application here, for it is expressly alleged that before any breach of the contract by Dumble, the principal, it was abandoned and a new contract, to which Dumble was no party, was made with another person, who took possession of the work. Up to that time there

had been no forfeiture of Dumble's contract, and no liability incurred by him. Before the defendant could be liable, therefore, the plaintiffs had put it out of Dumble's power to go on with the work. There could be no reservation of remedies under such circumstances, for there was nothing to reserve. There was a new contract with a stranger substituted for that with the principal, which was thenceforth at an end.

As to the fifth plea, where work is to be done and money paid for it, the covenants are termed mutual, though perhaps not strictly dependent : *Roberts v. Brett*, 18 C. B. 573 ; 6 C. B. N. S. 611, S. C. 11 H. L. Cas. 337 ; *Platt on Covenants* 95.

WILSON, J., delivered the judgment of the Court.

The fifth plea affords no defence to the action. The covenants of J. H. Dumble to do many different acts of more or less importance, the breach of any of which could be compensated for by a special pecuniary payment, could not, in an action by him to enforce payment of an instalment past due, be set up as a defence by the plaintiffs to that action.

In like manner the failure of the plaintiffs to make the payment of ten per cent. of a particular sum can be no defence in an action against the contractor or his surety for non-performance of his engagements, unless positively and unequivocally made so.

*Macintosh v. The Midland R. W. Co.*, 14 M. & W. 548, and the other cases cited on that point, shew this clearly.

The sufficiency of the third replication to the sixth plea is also questioned.

The plea shews that during an extended period given to the contractor within which he was to do the work, the plaintiffs, with the consent of the contractor, agreed in writing with another contractor that he should finish the work which the first contractor had engaged to do, and that the first contractor thereupon abandoned the work, and the new contractor entered upon and continued it, and

that all that happened before any breach of the original contract. That in equity, and it is pleaded equitably, is a discharge of the surety, the present defendant.

The replication to it is, that all the rights and remedies of the plaintiffs against the first contractor and his surety for non-performance of the original contract were reserved.

The replication is demurred to, on the ground that, notwithstanding the reservation of the plaintiffs' remedies, the defendant was discharged by the agreement made with the new contractor.

In no case have I seen a discharge of the original debtor before breach or default, and a change of place following between him and a stranger, who was to carry out the original agreement in his stead, and remedies reserved against the original surety, without his knowledge or consent, in case of default by the substituted party.

In such a case the original debtor or contractor might perhaps, by a reservation of remedies against *him*, if the agreement were worded to bear that construction, be deemed to be a surety for the substituted party; but the surety of the original contractor could by no possibility be continued as a surety without his consent for the performance of the contract by an entire stranger to him; nor can I comprehend what remedies there are to be reserved against anybody, principal or surety, before breach.

Parties might agree that an assignment of the work or contract might be made, and that the surety should nevertheless continue liable for the conduct or defaults of the assignee. Or it might be provided that the one for whom work was to be performed might when and if he chose take the work from the contractor and give it to another, and that the original surety should still remain liable. But in no way, excepting by positive agreement, can a surety for an original contractor be held liable upon any new or substituted contract, or for any default or breach of it, whether the new agreement be made with the first or with a new contractor.

The replication must be bad,



Something was said of the new agreement being by writing only, while the original agreement was by deed. The plea has not been demurred to; still if it were plainly bad we should be obliged to give judgment upon it. The want of a deed is no valid objection in equity: *Davey v. Prendergrass*, 5 B. & Al. 187; *Rees v. Berrington*, 2 Ves. Jun. 540, and also in *White and Tudor's* L. C. 887, 3rd ed.

The judgment will therefore be for the plaintiffs on the demurrer to the fifth plea, and for the defendant on the demurrer to the third replication to the sixth plea.

*Judgment accordingly (a).*

## BRACE V. THE UNION FORWARDING COMPANY.

*Boom on Ottawa river—Injury by collusion with steamer—Contributory negligence.*

About one-third of a mile above Snow Rapid on the Ottawa there are two booms owned by the Government, extending from the north and south side of and meeting at a capstan in the river, and another boom extends from the capstan down the stream to an island at the head of the rapid, thus dividing the river into two channels, of which the northern one was used by boats, and the other for running logs.

The plaintiff had a pocket boom on the south side, into which he was running his logs, and he had nearly closed the Government boom above it for this purpose, thus wrongfully obstructing the navigation.

When defendants' steamer arrived at the south Government boom on her way down it was not sufficiently open, and she struck and broke it about forty feet from the end, by which a number of the plaintiff's logs gathered above it, escaped, and were lost.

The plaintiff charged as negligence that the steamer came to within 150 yards of the boom before slackening speed, and then did not reverse her engine. On the other hand, it appeared that the defendants had sent notice to the plaintiff the night before that the boat would be down next day, being the 15th April, and the first trip of the season: that it was the custom to have the boom open for her without waiting, which she could not do safely so near the rapid: that when the accident happened the plaintiff was controlling the boom with a rope attached, instead of letting it swing open freely; and that until the boat came in sight, half a mile off, the plaintiff did not begin to get the rope ready by putting a chain on it to sink it under the vessel.

*Held*, there was at least contributory negligence on the plaintiff's part, if indeed the whole blame was not his; and that he could not recover.

*Quære*, as to the correctness of a nonsuit upon one of two counts.

(a) See *Port Whitby and Port Perry R. W. Co. v. Dumble*, 22 C. P. 39, where the Court of Common Pleas, in an action against the principal, appear to have taken a different view as to the replication.



THE second count stated that the plaintiff was lawfully possessed of a large number, to wit, 600 saw logs, then lawfully being in the river Ottawa, and secured together in a boom of the plaintiff, and the defendants were possessed of a steamboat which was then navigating the said river ; yet the defendants, by the carelessness, misdirection, and mismanagement of their servants in charge of the boat, ran foul of and struck against the said boom with great force, and broke and injured it ; by means whereof the saw logs escaped from the boom into the river, and were scattered about, and a great number, to wit, sixty of them, were lost, and the plaintiff was engaged for two days in collecting the residue of the logs, and in securing them.

The pleas were : 1. Not guilty. 2. That the plaintiff's boom had been wrongfully erected in and across the river, which at the times when, &c., was a common, public, and navigable river : that the defendants at the said times when &c., had occasion to use the river and to navigate the same with their steamboat ; and because the booms had been wrongfully placed, and obstructed the river, so that without breaking the same the defendants could not navigate the river as they ought to have done, the defendants at the times when &c., in order to remove the obstructions, and to enable them to pass with and navigate their steamboat, necessarily ran foul of and struck against the booms, doing no unnecessary damage to the plaintiff.

Issue.

The cause was tried at the last Fall Assizes at Pembroke, held before his Honour Judge Hughes, Judge of the County Court of Elgin, in the place of the Chief Justice of this Court.

The facts were, in substance, as follows : The river for some distance above the Snow Rapids is in its natural state in a single channel. The booms are about one-third of a mile above the rapid. One extends from each side of the river, and they meet at a capstan stationed in the river.

At the head of the rapid there is an island, which

divides the river into two natural channels, the north and south channels. The north channel is the one used for the running of logs. The south is the ship channel. From the booms which extend across the river there is another boom, leading from the capstan which unites them, extending down the stream to the head of the island. This last boom divides the river into two artificial channels, from the cross-booms to the head of the island.

The steamer above the booms keeps to the south side of the river, and from the booms, till below the island, she keeps in the artificial and natural channels at the south. The boom extending from the cross-booms to the head of the island is intended to keep and to lead the logs into the north channel, and as a consequence to keep them from the south or ship channel. These booms are Government booms.

The plaintiff, in the south channel, below the Government boom, had constructed a pocket boom, in which he had a great number of logs at the time of the accident.

The plaintiff said: "I was taking them down into my pocket boom, so as to avoid letting them go into the Boom Company's boom, and I was making use of the Government boom for my own purposes."

*A. Hitty*, a witness for defendants, said: "The plaintiff was booming his logs there into the steamboat channel for which the boom was not intended. \* \* We had no reason to expect there would be logs at the trip boom that morning at all."

The Government had not at that time placed men in charge of the booms.

The plaintiff swung the Government boom across the river himself. It would appear that the boom from the north shore to the capstan on the river must have been closed at that time, otherwise the logs would have passed into the north channel; and that the south boom must have been closed also, excepting some small part of it near the capstan, by which the plaintiff was running his logs above the boom into his pocket boom below it in the steamboat channel,—though that was not so stated on the evidence.

The accident happened on the first trip of the steamer that season. The captain sent word to the plaintiff the night before the boat came, that she would be down the next day.

The plaintiff said: "I expected the boat down that morning; but she came earlier than we expected. I heard it through my men that Captain Cowley had sent word that the boat would be down that day. She went down about eight o'clock: it was earlier than common."

The evidence generally shewed that the men at the booms saw the vessel approaching, and could see her for half a mile before she came to them, and that the men were opening the boom at the south to permit her to pass, and that the boom was partially open at the time of the accident—thirty or forty feet wide, as the plaintiff's witnesses said, but only twelve or fifteen feet according to the defendants' witnesses.

*George Reid*, one of the plaintiff's witnesses, said, "The opening at the boom was thirty or forty feet wide; a steamer could hardly go through without striking; to have attempted it she would have to run close up against the capstan."

The plaintiff said, "They (defendants) of course expected I would have had the boom open for them."

The captain of the boat said: "The upper boom was across the navigable part, where boats passed every day. I never found it since as it was then. We never expect to wait, and have never had to wait."

The injury complained of was that the boat ran against the south Government boom, and broke it about forty or fifty feet from one of the ends, so that a number of the plaintiff's logs gathered above the boom escaped and were lost before the boom could be repaired.

It was a question whether the plaintiff commenced to open the boom as soon as he should have done.

The plaintiff's son said: "We went there about four in the morning to boom out our logs. We were hurrying to get our logs. We thought we had plenty of time, and that

she (the boat) would stop; we were getting the logs into the pocket boom."

*A. Hillyard*, a witness for defendants, said: "When we first saw the men they were working at the logs, and no preparations were being made to open the boom and let us through."

*John Murphy*, a witness for defendants, said: "The boom was stationary, and it appeared the plaintiff intended to get the logs out before he intended to allow the boat to pass. They were trying to let the logs float into the pocket boom."

The boat was kept at her speed till within about 150 yards of the boom; the steam was then taken off; the engine was not reversed; and she came on with a good deal of force against the boom.

The Captain said: "I thought they would let the boom go."

The plaintiff let the boom swing back with the stream, keeping command of a rope at the end of the boom, to close it again when the boat had passed. He had attached a chain to the rope to sink it, and keep it out of the way of the boat. The rope was not, however, sufficiently sunk, or out of the way, for the wheels fouled with it; and it took twelve or fifteen minutes to free it from the wheels; during all which time logs were escaping from above the boom.

The Captain said: "The rope that held the boom was almost on the surface of the water." He also said: "When I saw the river nearly boomed across, I stopped the boat, and expected to see them open the boom, and let us through; and as it was not proper, but dangerous, to wait there at the head of a rapid, I let the boat drift against the boom." He afterwards said: "We struck the boom in the place we did, forty feet from its end, because the wind took us then on the port side. We steered for the open passage."

The plaintiff said: "One minute's delay would have spared the damage."

*Mr. Reid* said: "I think the breaking of the boom might have been avoided, if the steamer had reversed her engine five minutes before she reached the spot."



The plaintiff's son said : " I think the injury could have been avoided by a few minutes, not over five minutes delay ;" and Charles McLaren, another witness, said the same.

There was a verdict for the defendants on the issues to the first count, and for the plaintiff on the issues to the second count, with \$70 damages.

At the close of the plaintiff's case it was contended by defendants' counsel that the plaintiff should have left the stream clear : that the defendants had the right to the use of the river for their steamers : that the injury which was done to the boom was caused by its being illegally across the stream, and because the plaintiff did not open it in time to let the steamer pass ; and that there was no evidence of negligence or unskilfulness on the part of the defendants.

The question as to the alleged negligence was left to the jury, but leave was reserved to the defendants to move to enter a nonsuit, if entitled to it, on that point. The defence was then proceeded with.

As to the second count, the learned Judge charged the jury that it was the duty of those managing the vessel to use greater care at all points of danger from collision with others using the river for any lawful purpose, and that the slackening speed or stopping the vessel might be necessary at those points in order to avoid the collision and injury to others, and their property : that it was the duty of those using the river for any other than the purposes of navigation to use due care, so as not to stand recklessly in the way of vessels navigating the channels of the river : that the notice sent to the plaintiff by the captain, that the boat was going to pass the boom next morning, was such as should have placed the plaintiff on his guard, and ought to have caused him to prepare for the vessel when she came : that if the vessel were not stopped at a sufficient distance above the boom after the person in command saw the passage was not clear, so as to avoid doing an injury, it would be negligence on the part of the defendants, because they were bound to do all that

was reasonable to avoid collision and injury to the plaintiff, and that the jury must find for the plaintiff: that, on the contrary, if the plaintiff, knowing the steamer was coming, went on up to a time when it was not safe to keep his logs there, and delayed the opening of the boom, so that the steamer came on and got into the difficulty, and the injury were caused by the negligence contributed to by the defendants as well as by the plaintiff, they should find for the defendants.

For the plaintiff the charge was objected to, because it was said the learned Judge should have told the jury that it was the duty of the defendants to have stopped the steamer for a reasonable time, until the boom was opened.

For the defendants it was objected that the jury should be told that it was the duty of the plaintiff to have had the boom open, and that the defendants did all that was reasonable to be done.

The two counts were relied on as distinct causes of action in fact, and not as different statements of the same cause of action. The one act of damage took place at a point above the Snow rapids, about the 15th of April, and the other at a point below the Snow rapids, about the 15th of May.

The jury found in favour of the defendants in respect of the complaint as to the lower boom, that is, as to the alleged injury committed on the 15th of May; and a verdict was entered for the defendants on the first count.

The complaint now in question is therefore confined to that which relates to the breaking of the upper boom, which happened about the 15th of April, and which is the cause of action said to be contained in the second count.

During this term *S. Richards*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict in this cause, or the verdict obtained by the plaintiff on the second count, should not be set aside, and a nonsuit,

or a nonsuit on the second count, be entered for the defendants, pursuant to the leave reserved, on the ground that there was no evidence to go to the jury, or entitling the plaintiff to recover on the second count, and also on grounds and objections taken at the trial.

*Harrison, Q. C.*, shewed cause. The defendants had no right wilfully or negligently to injure the plaintiff's boom enclosing his logs, although it was unlawfully in the River Ottawa: *Davies v. Mann*, 10 M. & W. 546; *Campbell v. Great Western R. W. Co.*, 15 U. C. R. 498; *Watson v. Northern R. W. Co.*, 24 U. C. R. 98; *Oppenheim v. The White Lion Hotel Co.*, L. R. 6 C. P. 515. If the defendants had been suing the plaintiff for injury done to their boat on the occasion, they could not have recovered unless they had shewn they could not have avoided the boom: *Butterfield v. Forrester*, 11 East 60; *The General Lee*, 19 L. T. N. S. 750; *Re Pennsylvania*, 23 L. T. N. S. 55.

*S. Richards, Q. C.*, supported the rule. The boom was a Government boom, but the Government had not taken possession at the time of the accident. When the Government takes charge, they place a man to open the boom for all boats. The plaintiff took possession of the boom without authority. He had no right to place it across the river. The plaintiff knew, by the word which defendants had sent to him, that they would require to pass the boom at the time they came. He did not open the boom wide enough to permit the boat to pass, so that it drifted against the boom and broke it, and the plaintiff thus directly occasioned his own injury. The boat could not otherwise pass down on her trip: *Dowell v. The General Steam Navigation Co.*, 5 E. & B. 195; *Witherley v. The Regent's Canal Co.*, 12 C. B. N. S. 2.

WILSON, J., delivered the judgment of the Court.

The defendants have not denied the plaintiff's title to or possession of the boom in the river, of which the plaintiff says he was possessed.

The plea is that the boom, although the plaintiff's property, was wrongfully in the river as an obstruction to the free use and navigation of it as a common, public, and navigable river, so that without breaking the boom the defendants could not navigate the river as they ought to have done.

There can be no doubt that, whether the plaintiff was the owner of the boom or not, it was wrongfully in the river obstructing the navigation at the time of the accident.

The Public Works Act, Consol. Stat. C. ch. 28, was not referred to, but it is evident from Secs. 10 and 13, and Schedule A, under the sub-division, "Navigations, Canals, and Slides," that all "such portions of the Ottawa River, from the City of Ottawa upwards, as have been, or shall be, improved at the expense of the province," and from that part of the same schedule under the heading of "Public Works generally," that "all other canals, &c., or other public works of a like nature, constructed, repaired, or improved at the expense of the province;" and from the fact of the booms in question having been described as "Government booms," of which it is said the Government specially place men in charge every year; that the particular portion of the river where these booms were was Government or public property specially, by virtue of the Statute and of the works erected there; and the evidence shewed that the very booms in question were the property of the Crown.

Both the booms which cross the river and meet at the capstan in the body of the river are spoken of as Government booms. Whether that is so or not I cannot make out.

The purpose of the south boom is, no doubt, to close that part of the river, and to prevent logs passing down by that channel. The purpose of the north boom, which is also called the property of the Boom Company, is, as well as I can make out, to prevent logs getting into the north channel, when persons do not wish to use the privileges of the Boom Company and to pay them toll, and to force the logs of such persons down by the south channel.



In order that the Boom Company may use their north channel with effect, they must be at liberty, when they open their own boom, to close the one at the south. No purpose could be gained by any one by closing both booms, but to keep back all the logs which came down. That is the course at night. And no purpose could be gained by the company if both booms were left open. To use one channel only the boom of the other must be closed. The Boom Company was probably established under the Consol. Stat. C. ch. 68.

How far the Crown rights are modified by the Boom Company's privileges, was not adverted to.

If any person or body of persons can use the south boom, it may possibly be the Boom Company, in order to get the benefit of their own channel. At night probably all persons floating logs are interested in having both booms closed. During the day, I should doubt if any person but the Boom Company, for the reason before stated, has the right, unless the license so to do has been permitted by the Crown, of which there is no evidence, to close the south boom, in order to enable him to collect or direct his logs into a pocket or private boom of his own, formed in the ship channel of the stream. It was for that purpose that the plaintiff was using the government boom at the time of the accident.

The north boom was quite closed, and the south boom was either closed or just so far open as to permit the plaintiff to pass his logs under or through the boom into his own private boom. The whole passage of the river was therefore obstructed.

I think he had no right so to use the booms of the Government, or to bar the whole width of the river. The question is whether he has not, nevertheless, a right to be indemnified for the injury he has sustained by the defendants' act under some state of circumstances, or whether he is barred of redress under all or any circumstances.

The defendants would not be justified in destroying or injuring the boom, merely because it was in the river, if they could by reasonable care on their part have avoided doing so. In abating a nuisance of that description, a private person can interfere with it only to the extent to which it is an injury to him, and obstructing his passage: *Dimes v. Petley*, 15 Q. B. 276, 283.

The question then is, could the defendants by the exercise of care on their part have avoided the consequences of the neglect or carelessness of the plaintiff: *Tuff v. Warman*, 5 C. B. N. S. 573.

The whole width of the stream was blocked up by the plaintiff. He knew the defendants' steamer was to approach that morning. He was using the booms for his own private purpose, to collect his logs in the ship channel, where it was not proper he should collect his logs. The south boom should not have been closed at all, for any purpose for which the plaintiff was then at liberty rightly to use the river.

The plaintiff's men saw the steamer half a mile above the boom. The steamer could be better seen from the booms than the booms or their position from the steamer.

It is charged as inexcusable carelessness of the defendants, that the steamer was kept at full speed till within 150 yards or so of the boom, and that although the steam was taken off the engine was not reversed. The reason the boat approached so near before stopping her way, was explained by the plaintiff himself when he said, "They (those in charge of the boat) of course expected I would have had the boom open for them." The Captain also said, "we never expect to wait, and have never had to wait."

When once the steamer was in that position she could not avoid the collision with the boom, unless the reversing of her engine could have accomplished it. She did not do that. *Reid*, one of the plaintiff's witnesses, said the accident might have been prevented if the engine had been reversed "five minutes before she reached the spot." These

five minutes would be at the distance of five-sixths of a mile off, if the vessel were going, as it was said she was, at the rate of ten miles an hour.

*Murphy*, one of the defendants' witnesses, said: "I do not know how the accident could be avoided, because unless the vessel were stopped half a mile off she could not avoid the difficulty; but the state of the boom could not be seen half a mile off.

It does not seem to have been altogether prudent for the steamer to have kept on at full steam not knowing whether the channel was clear or not, and the rate of her headway at such a place must necessarily have a good deal to do with the determination of the question negligence or no negligence on her part: *The Pennsylvania*, 23 L. T. N. S. 55.

The custom on the river "of course to have the boom open for the boat," and the positive notice given to the plaintiff the night before that the boat would be down that morning, and the plaintiff's own expectation of its coming, may have brought the boat into the place it was, 150 yards from the boom, without having taken any prior precaution to ascertain the actual condition of affairs at the boom: *Dowell v. The General Steam Navigation Co.*, 5 E. & B. 195, 208.

There is no evidence to shew that the reversal of the engine at 150 yards distance, in the current running, as it was said, at three or four miles an hour, could or would probably have altered the state of things. It is not probable it would, and the Captain said, "it was not proper, but dangerous to wait there at the head of a rapid."

It appears, also, from the evidence, that the boom was in the act of swinging in towards the bank when it was struck, and that a space varying from ten to forty feet, according to the feelings, interest, or eyesight of the witnesses, was open of the channel.

It appears, too, that the rope attached to the end of the boom was not sufficiently sunk out of the way of the vessel,

as she fouled on it, which indicates that the rope was not slackened, but was still some drag on the opening of the boom, and was controlling it when it was struck by the steamer.

If the rope had been quite slack, and the boom free, the injury might not have happened, or might not have been so great. The Captain apparently refers to that when he said, "I thought they would let the boom go."

There is another view of the case which the evidence plainly suggests, and that is, whether the plaintiff—with his knowledge of the coming of the boat, and of the necessity for promptness on his part to have all clear of the ship channel in such a stream, at such a time of the year, and at the head of a rapid—had made any proper preparation for the opening of the boom in time to allow the ship to pass.

There are various passages in the evidence on this point, before referred to, raising some presumption against the plaintiff. The following extract from the evidence of the plaintiff's son is also material: "We heard the steamer was to be down that morning, and when we saw her coming down the river we commenced to get the ropes ready, and put chains on to sink it to let the boat pass over." He also said, as before stated, "we were hurrying to get in logs; we thought we had plenty of time, and that she would stop."

These two passages operate very much against the plaintiff. *Commencing* to get the ropes ready by putting the chain on to sink the rope, when the steamer was in sight, or half a mile off, as that is said to have been all the distance she could be discerned above the boom, or, in time, three minutes of a vessel going at ten miles an hour, before the steamer would be down on them, shews great neglect and something like positive misconduct on the plaintiff's part. And then the expectation that the steamer *would stop*,—what for is not said, but the inference is until the plaintiff had got his logs through the boom, before the vessel would claim her right of passage—is quite in accordance with the delay to provide for the removal of the obstruction.



Upon a full examination of this case, we are of opinion the plaintiff has disentitled himself to recover by what must be held to have been contributory negligence on his part, and we think also there is much in the evidence to shew that the cause of the misfortune is to be traced to the plaintiff's culpability alone.

The rule, therefore, will be absolute to enter a nonsuit on the second count, if the defendants choose to take it in that form, as to the correctness or propriety of which we say nothing; or if they please they may take the rule to enter a nonsuit generally.

*Rule absolute.*

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### ALLEN QUI TAM V. JARVIS.

*Consol. Stat. U. C. ch. 15, 29 Vic. ch. 39—County Judge drawing papers—  
Penal action.*

The Consol. Stat. U. C. ch. 15, sec. 5, as amended by 29 Vic. ch. 30, enacts, that no County Court Judge shall directly or indirectly practice in the profession of the law as counsel, attorney, solicitor, or notary public, or as a conveyancer, or do any manner of conveyancing, or prepare any papers or documents to be used in any Court of this Province, under the penalty of forfeiture of office and of \$400.

The declaration alleged that defendant, being such Judge, did in certain proceedings in the Surrogate Court prepare certain papers and documents to be used in said Court, to wit, the petition of one G., &c. describing the papers). Defendant pleaded that he did not practice in the profession of the law as an attorney for said G., or as such attorney prepare any papers or documents to be used in said Surrogate Court.

The evidence shewed that defendant prepared *gratuitously* for G., who was a widow in poor circumstances, the petition, bond, and affidavits required to enable her to obtain administration to her late husband.

*Held*, that the second plea was proved, and a verdict was therefore entered for defendant on the leave reserved.

Per *Draper, C. J. of Appeal*, and *Morrison, J.*, the evidence did not bring defendant within the spirit of the act or the mischief against which it was directed, which was the doing the acts prohibited *for profit*.

### ACTION *qui tam*.

Declaration.—The first count stated that defendant on the 4th of February, 1871, being Judge of the County Court of Stormont, Dundas, and Glengarry, (under Consol. Stat. U. C. ch. 15,) did by himself practice in the profes-

sion of the law as attorney and solicitor for one Mary Goddard, in a proceeding in the Surrogate Court of the same United Counties, being a Court holden under chapter 16, Consol. Stat. U. C., to wit, an application to the said Surrogate Court on behalf of said Mary Goddard for the issuing by the Court to her of letters of administration of the goods, &c., of one E. Goddard deceased, contrary to the provisions of the above act, cap. 15, whereby defendant forfeited to the plaintiff \$400.

Second count: That defendant, being such Judge, after the passing of the County Courts Act, did in certain proceedings in the said Surrogate Court prepare certain papers and documents to be used in the said Surrogate Court, to wit, the petition of the said Mary Goddard filed in the said matter in the said Court, on, &c., and a certain bond executed by the said Mary Goddard, Joseph Sabourin and Luke Sabourin, filed in the said matter, on, &c., and a certain affidavit of the said Joseph Sabourin and Luke Sabourin filed in the said matter in the said Court on, &c., and a certain affidavit of the said Mary Goddard to be sworn by her, filed in the said matter on, &c., and a certain other affidavit sworn to by the said Mary Goddard, filed in the said matter, on, &c., contrary to the provisions of the firstly mentioned Statute.

The third count charged that defendant, being such Judge, did, by himself, practise as a conveyancer, and did certain conveyancing for one Mary Goddard, contrary, &c.

The defendant to the first count pleaded, 1st, not indebted; and, 2nd, that he did not practise in the profession of the law as attorney or solicitor for the said Mary Goddard, contrary to the said Statute.

To the second count, 1st. not indebted; and, 2nd, that he did not practise in the profession of the law as an attorney for the said Mary Goddard, or as such attorney prepare any papers or documents to be used in the said Surrogate Court, contrary to the Statute.

And to the third count, 1st, not indebted; and, 2nd, that he did not practise as a conveyancer, or as a conveyancer

do any conveyancing for the said Mary Goddard, contrary to the Statute.

Issues on all the pleas.

The trial took place in November last, at Cornwall, before Richards, C. J.

The Clerk of the Surrogate Court produced,

1. A petition from Mary Goddard, filed on the 4th of February, 1871, addressed to the Surrogate Court, stating that she was the lawful widow of Ethien Goddard, who died about the 10th of April, 1856, intestate; that his personal estate was only about \$50; and she prayed that letters of administration might issue.

2. A bond, to the defendant, entered into by Mary Goddard, Joseph Sabourin, and Luke Sabourin, dated 4th of February, 1871, in a penalty of \$100, being an ordinary administration bond to the Judge.

3. An affidavit of justification by Joseph Sabourin and Luke Sabourin, sworn before the defendant, as Surrogate, on the 4th of February, 1871.

4. An affidavit, apparently intended to be taken, but not sworn, by Mary Goddard.

5. An affidavit made by Mary Goddard, and sworn to on the 4th of February, before the defendant as Judge Surrogate, swearing to the value of the intestate's effects.

6. An order in defendant's handwriting, dated 20th of February, 1871, that letters of administration should issue.

The letters of administration were produced. They were granted after receipt of the certificate required by the 39th section of the Surrogate Act, Consol. Stat. U. C. ch. 16.

Mary Goddard proved that the defendant sent for her, and she went, and while she was there he wrote some papers and gave them to her. The papers above stated, marked 1 to 5, were admitted to be in his handwriting. He did not demand, nor did she pay anything or promise to pay anything for the preparation of them. She said she was a poor woman living by day's work.

The defendant called no witnesses, but his counsel contended that all these papers were prepared gratuitously, as



an act of charity to a poor woman: that he was acting as Judge of the Surrogate Court, and had a right to examine her as a suitor applying for letters of administration, and to reduce to writing what, in his capacity as Judge, he knew he had a right and it was his duty to require, as such Judge, to enable her to take out the letters of administration: that she came to him as Judge, and that the acts done by him could not be deemed to be within the mischief intended by the act, and therefore did not incur the penalty: that the act could not mean that a person must employ an attorney or solicitor to obtain letters of administration; they may apply in person; and Mary Goddard did so, and defendant was acting judicially.

The learned Chief Justice reserved leave to defendant to move to enter a nonsuit or verdict for defendant, if the Court should be of opinion that the prohibition only applies to services rendered in contemplation of some fee or reward, and not when done entirely gratuitously, as it appeared was undoubtedly the case here. He told the jury that this might possibly be a case where the fact that the documents are in the defendant's handwriting is not necessarily conclusive evidence that he *prepared* the papers, but there was no evidence that any one else did so, the tenor of his remarks being strongly adverse to the defendant.

The jury found for the plaintiff on the second count of the declaration, and for the defendant on the first and third counts.

In Michaelmas Term, *M. C. Cameron*, Q. C., obtained a rule calling on the plaintiff to shew cause why a nonsuit should not be entered, or a new trial granted, the verdict being contrary to law and evidence; and for misdirection, in telling the jury that although the defendant did all that was done by him gratuitously, if he prepared the papers he was liable to the penalty, and in not telling the jury that the defendant as Judge of the Surrogate Court had authority to do the acts complained of; or why the judgment should not be arrested, the count charging that the offence was against one particular specified Statute,



whereas the action was sustainable only, if at all, on the words of another and amending Statute.

*J. K. Kerr* shewed cause. The question is whether the acts done by defendant, as proved at the trial, render him liable, under the Statute, to the penalty. One object of the enactment was to prohibit the Judge from acting in any way in matters in which he might afterwards be called upon to pronounce a judicial opinion, for there might be a desire on his part to sustain a deed or other document to which he had committed himself by drawing it. Here on these papers drawn by himself he made an order for letters of administration to issue, which was clearly a judicial proceeding. The other papers drawn by him were proceedings or documents to be used in a Court, and the Act says, "in any Court of this Province," not merely in his own Court. [DRAPER, C. J. OF APPEAL.—Suppose he was sitting as Judge of the Surrogate Court, and this woman applied personally to him for letters of administration; that he questioned her as to her right to them, and, her answers being given, he drew the necessary papers. Would that be illegal?] Probably, but it is not this case. [WILSON, J.—Suppose he were to draw his own will.] In such a case he could never be called upon to pronounce a judicial opinion upon the will. Another object of the Act was to avoid bringing the Judge in contact or competition with the profession. [DRAPER, C. J. OF APPEAL.—A married woman wishing to convey her estate goes before the Judge for examination, and he writes the necessary certificate on the deed. Would that subject him to the loss of his office?] Yes, if it could be said to be "any manner of conveyancing." But the Statute in such cases expressly provides that the Judge shall endorse the certificate on the deed. This case, however, differs from all those suggested. The Judge here sent for the woman; she did not apply of her own accord. His reason for sending for her was not explained, and he was not examined at the trial, although present. There is another reason why such a practice should be discouraged. Being sent for by a Judge

she would naturally suppose that all was right, and sign any papers as of course, as in fact she says she did here. Was not the Statute intended to prevent this? It is of no consequence that the act was done gratuitously, or what his motive may have been; the Statute prohibits it altogether, and for other reasons than merely to prevent the Judge from making money. *Ackroyd v. Gill*, 5 E. & B. 808, is an analogous case. In *Taylor v. The Crowland Gas Co.*, 10 Ex. 293, the Act imposed a penalty upon unqualified persons acting as conveyancers; and Parke, B., in giving judgment said, "The question in all these cases is, whether, looking at the Statute, the object of the Legislature in imposing a penalty was to prohibit the particular act, or whether it was for a different purpose." *Warden v. Stone*, 7 E. & B. 603, may be relied upon for the defendants; but there the prohibition was against the defendant, who was high bailiff of the County Court, acting in any proceeding in the same Court; here it is against drawing papers to be used in any Court. The defendant there acted for a person applying to the Judge under the Absconding Debtors' Act, and his conduct was disapproved of, though he was held not liable to the penalty. *Nicholson v. Fields*, 7 H. & N. 810, 817, lays down the true rule of construction applicable to penal acts. See also *Simpson v. Ready*, 12 M. & W. 736; *Dwarris on Statutes*, 634, 635, 641.

*J. H. Cameron*, Q. C., and *M. C. Cameron*, Q. C., contra. The defendant is not liable, for he was not acting as County Court Judge in preparing these papers, but as Surrogate Judge. By sec. 1 of the Act respecting the Surrogate Courts, Consol. Stat. U. C. ch. 16, he was confirmed in his appointment as such Judge: by sec. 15 he is authorized to administer oaths in all matters in such Court; and by sec. 20, subject to the rules to be made under the Act, he is directed to examine the witnesses orally, and the parties may verify their respective cases by affidavit, on which affidavits the deponents are to be also examined by him in open Court. Rule No. 2, made under the Act, provides that the application for letters of administration may be

in person, as it was here. The defendant merely prepared the affidavits and papers, which as Surrogate Judge he had a right to do, and he acted in that character only; and not in any capacity mentioned in the Statute on which the plaintiff sues. The case of *Warden v. Stone*, 7 E. & B. 603, is very analogous. There the Statute imposed a penalty on any high bailiff for a County Court who should be concerned as attorney or agent for any party in any proceeding in the said Court. The defendant being high bailiff of the County Court of Lancashire, was concerned as attorney and agent in an application to the Deputy Judge of the Court for a warrant under the Absconding Debtors' Arrest Act. It was held that he was not liable, for that it was not a proceeding in the County Court: that though the Judge of the County Court was authorized to act, he acted as authorized by the Absconding Debtors' Act, and not as a County Court Judge. This shews that a person holding one office may be acting in virtue of another; and it must be proved that in what is complained of he was acting in the character in which he is prohibited from acting. Here the defendant held different commissions for different offices under different Statutes, and he was clearly not acting as County Court Judge in preparing the papers in question. The second count moreover is defective in not referring to the amending Act, 29 Vic. ch. 30, under which the offence sued for is created, and in not stating that the defendant acted in any of the capacities specified by the Statute. It is alleged also that the act done was contrary to the Statute, whereas there are two Statutes: *Fife v. Bousfield*, 6 Q. B. 100; *Lee v. Clarke*, 2 East 333; *Wells v. Iggulden*, 3 B. & C. 186. The object of the Statute was to insure due respect for the office of County Judge, and to protect the profession by preventing him from making any profit from acting as an attorney or conveyancer. An act of charity such as this was, is neither within the spirit of the Act nor the mischief which it was intended to guard against, which was the receipt by a Judge of fees for acting in a different capacity.



DRAPER, C. J. OF APPEAL.—The action is founded upon the 5th section of the Consol. Stat. U. C. ch. 15, as amended and extended" by the Stat. of Canada 29 Vic. ch. 30.

The first provides that no Judge of the County Court "shall during the continuance of his appointment, directly or indirectly, practise in the profession of the law as counsel, attorney, solicitor, or notary public, under the penalty of forfeiture of office, and the further penalty of \$400, to be recovered by any person who may sue for the same by action of debt or information in either of the Superior Courts of Common Law." The latter enacts that the foregoing section "is hereby amended and extended by the addition of the words 'or as a conveyancer, or do any manner of conveyancing, or prepare any papers or documents to be used in any Court of this Province,' which words are hereby incorporated in that section, and shall be read as a part thereof immediately after the word 'Public' in that section."

Confining attention in the first instance to the earlier statute, there is first an unlimited prohibition to practise directly or indirectly in the profession of the law. This was previously expressed in the 3rd section of the 8 Vic. ch. 13 in similar language: "No Judge \* \* shall directly or indirectly practise, or carry on, or conduct any business in the profession or practice of the law," on pain of forfeiture of office and a further penalty of £100. But in the Consol. Stat. U. C. ch. 15, sec. 5, these words are added immediately after the word law, viz., "as counsel, attorney, solicitor, or notary public." These added words appear to me to have particularized the very extended language of the prohibition, and by designating that by the words "practise in the profession of the law" was intended acting as counsel, attorney or solicitor for others, it was the object of the prohibition to prevent a Judge of the County Court, during the continuance of his appointment deriving in any form profit from the profession of the law, except the salary attached to his office.

I must admit that I do not understand why the words



"or Notary Public" were introduced, for one does not associate the duties or powers of a Notary Public with what is commonly understood as the practise of the law.

Several years afterwards this statute was extended and amended, by adding after the word "Public," as a part of the fifth section, these words, "as a conveyancer or do any manner of conveyancing, or prepare any papers or documents to be used in any Court of this Province." The words "as a conveyancer" should in my opinion have followed rather than preceded the words "or do any manner of conveyancing," because I think the prohibition to do any manner of conveyancing was, as in the case of practising in the profession of the law, aimed at the deriving any profit from conveyancing, and such, as was intimated at the bar, and as has been said elsewhere, was the mischief intended to be remedied by this enactment; not simply to protect the legal profession, which I apprehend would benefit very little from restraining County Court Judges from conveyancing, when so many others followed it who were not restrained, but also to prevent the lowering the character of or diminish proper respect for the County Court Judges.

If this view of the Statute be correct as to those prohibitions of any infringement whereof the defendant is expressly acquitted, it remains to enquire whether the same limitation or qualification does not apply to the prohibition against preparing any papers or documents to be used in any Court of this Province.

Now it may be first of all observed, that the preparation of papers and documents to be used in Courts falls legitimately within the first prohibition, to practise directly or indirectly in the profession of the law, and if the mischief intended there to be prevented was the doing of acts of practising for profit, as a counsel, attorney, or solicitor, I do not see on what sound principle a similar construction should not be applied to these words. To come to the particular facts of the only count on which there is an adverse verdict to the defendant; there is no pretence for asserting that the evidence discloses any pecuniary profit

to the defendant arising or expected from the preparation of the papers or documents already mentioned. He has prepared them, but has done it gratuitously, and for a widow in poor circumstances.

I see no reason for holding that an application for letters of administration may not be made to the Judge at any time, and whether at his own house or elsewhere. He is allowed, under the Surrogate Courts Act (Consol. Stat. U. C. ch. 16), to receive to his own use (among some other fees) a fee of twenty cents per folio on evidence taken before him, which I take to mean evidence reduced to writing by him, and which literally would be a paper to be used in Court. That Act also provides that when necessary, parties in all contentious matters may be examined orally by or before the Judge in open Court; and the evidence must be taken down in order to meet the possible exigency of a reference to the Superior Courts of law or equity. We all know that it is a common practice for the Judge to take it down.

I refer to these instances to confirm the opinion at which I have arrived, that the evidence does not bring the defendant *within the mischief* against which the Act was framed: that if he has contravened the letter, and it is difficult to say he has not, he has not offended against the spirit in act or in intention; and that, in view of the very serious penalties imposed by the Statute, a verdict which is founded on the most literal application and construction of the words used ought not to be sustained.

Leave was reserved to move for a nonsuit, and, speaking for myself only, I think the rule *nisi* for that purpose should be made absolute, for the reasons I have endeavoured to explain.

There is one other ground upon which we all concur in making the rule absolute to enter a verdict for the defendant. The second count (the only one on which the plaintiff has succeeded) charges that the defendant did prepare certain papers and documents to be used in the Surrogate Court. The defendant pleads that he did not

practice in the profession of the law as an attorney for the said Mary Goddard, or as such attorney prepare any papers or documents to be used in the said Surrogate Court, &c., on which issue is taken.

The evidence given at the trial is abundantly sufficient to establish the affirmative of that issue on the part of the defence.

WILSON, J.—The defendant upon the evidence is entitled to have a verdict entered for him on the second issue to the second count. That substantially disposes of the count, because the plea goes to the whole cause of action. Whether the plea is good or bad is of no consequence in this instance.

It is not necessary therefore I should express any opinion upon the legal merits of the case, or the proper construction to be placed upon the statute. To the extent I have stated I am in favour of the motion now before us.

MORRISON, J., concurred with the Chief Justice.

*Rule absolute.*

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### BRUTY V. THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

*Railway—What is passengers' luggage—Liability for loss.*

The plaintiff, a carpenter, had with him, as a passenger by defendants' railway, a box containing a concertina, *a rifle, a revolver, two gold chains, a locket, two gold rings, a silver pencil case*, a sewing machine, and a quantity of tools of his trade, such as chisels, planes, &c. The box having been lost at the Toronto station while in defendants' care:

*Held*, that the articles in italics were ordinary personal luggage, for which defendants were responsible, but that the others were not: Wilson, J., dissenting as to the concertina.

*Held*, also, that the fact of the other articles being in the box could not prevent the plaintiff from recovering for such as were personal luggage.

THE first count stated that the plaintiff was a passenger by defendants' train from Montreal to Toronto with his luggage, and that defendants did not safely carry and

deliver to him at Toronto one of the boxes which he had given to them. The second count was in trover for the same goods.

Defendants pleaded to the first count :

1. A denial of the delivery to them by the plaintiff of the goods.

2. A delivery by them of the goods in Toronto.

3. To the second count, not guilty.

4. To the declaration, so far as it relates to the following goods :—a concertina, a rifle, a gold albert chain, a gold lady's chain, a gold locket with likeness, a gold keeper ring, a gold signet ring, a silver pencil case, a sewing machine, and the following carpenter's tools : two brass-back tenant saws, a hand saw, a brace and set of bitts, five augers, one set of chisels, one set of gouges, one mortice lock chisel, one plane and irons, one set of bead planes, and one half set of hollows and rounds—the defendants say that they carried passengers with their ordinary personal luggage free of charge for the luggage : that the plaintiff did not give notice to defendants that the luggage contained such articles as are before mentioned, and the defendants had no knowledge that the same formed part of the stuff which the plaintiff delivered to them, and which they received as personal luggage; and that the said articles were not personal luggage, but freight or extra luggage, and should have been paid for as such by the plaintiff, and defendants would not have received them as personal luggage if they had known what the articles were; and that the same were, while on the passenger train, or at the defendants' station at Toronto, lost or stolen. Issue.

The cause was tried before Hagarty C. J., C. P., at Woodstock, at the last Spring Assizes, when a verdict was rendered for the plaintiff for \$336.30.

It appeared that the plaintiff was a carpenter and joiner and came to this country from England with his wife. They were emigrants. They were sent by the emigration committee, paying £3 sterling a head as far as Montreal for them. It appeared, also, that the emigrant agent paid half the plaintiff's own fare from Montreal to Toronto, and the whole fare for his wife.



There was a good deal of evidence given at the trial for the purpose of shewing that the plaintiff had only three boxes and a bundle, while he insisted he had four boxes and a bundle, the fourth being, as he said, the missing box lost on the train. The plaintiff said he reached Toronto about noon; he stayed two or three hours there, leaving the luggage at the station; about half-past three he claimed the luggage from the baggage master at the station on his starting for Hamilton; he found all but the one box; the baggage master said the box had either gone west, or had not come to Toronto at all; the box had never been got; the box contained all the articles set forth in the list which was produced at the trial, clothing, jewelry, sewing machine, fire arms, concertina, and carpenter's tools; the value was \$361.90.

At the close of the plaintiff's case, it was contended by the defendants' counsel that the plaintiff was not entitled to recover for any of the articles which were not personal luggage: that when the plaintiff arrived in Toronto he did not claim his luggage, but went away for some hours; and that there was no proof of loss of the box on the road.

Leave was reserved to enter a nonsuit on these points, or to reduce the verdict by the value of any of the articles which should not be considered to be personal luggage, such as the concertina, rifle, revolver, carpenter's tools, and sewing machine; and a verdict was rendered for the plaintiff, for \$336.30.

The learned Chief Justice noted that he did not ask the jury to say what was personal luggage and what was not.

In Easter Term last *C. S. Patterson* obtained a rule calling on the plaintiff to shew cause why a nonsuit should not be entered, pursuant to leave reserved, on the ground that the promise and duty alleged in the first count were not proved and were not to be implied, inasmuch as a large part of the contents of the box in question was other than

passengers' baggage, and that no negligence or failure safely to carry to Toronto, or otherwise, by the defendants, was shewn; or why the verdict should not be reduced by deducting the value of the goods enumerated in the last plea of the defendants, on the ground that such goods were not passengers' luggage.

In Michaelmas Term last, *S. Richards*, Q. C., shewed cause. The defendants contend that because some of the articles in the box may not have been personal luggage, the plaintiff cannot recover even for the rest; but there is no such rule of law. He must be entitled to recover for what the defendants themselves admit to have been personal luggage. It was urged by defendants that they had carried the box to and had delivered it at Toronto, and that it must be presumed they had done so, because the plaintiff on arriving at Toronto went off for an hour or two without seeing after his luggage. The defendants, however, placed all the plaintiff's luggage in their baggage room, excepting this box, and the baggage master said the box had either not arrived at Toronto, or had been sent on to the West. These facts are evidence of loss against the defendants. *Penton v. The Grand Trunk R. W. Co.*, 28 U. C. R. 367, does not apply, for in that case the plaintiff actually got possession of his luggage, and helped to put it into the railway store-room.

Then as to what articles will constitute personal luggage: that question must be considered in relation to the facts of the case. The plaintiff was an emigrant, and was known by the defendants to be one. It must be known that such a person carries with him a greater variety and quantity of articles as personal luggage than ordinary passengers do. That which would not be properly personal luggage of or for an ordinary traveller, might very properly be the personal luggage of an emigrant. Jewellery must certainly be personal luggage: *Phelps v. London and North Western R. W. Co.*, 19 C. B. N. S. 321; *Macrow v. The Great Western R. W. Co.*, L. R. 6 Q. B. 612. The concertina would fall within the same rule. The tools of a carpenter are

considered to be part of his personal luggage: *Porter v. Hildebrand*, 2 Harris Penn. R. 133. The sewing machine must, therefore, be equally protected. Revolvers have been held to be personal baggage: *Woods v. Devin*, 13 Illinois 746; *Davis v. Michigan Southern, &c., R. W. Co.*, 22 Illinois 281. It is not easy to say what may or may not constitute personal luggage, but looking to the position of the plaintiff as an emigrant, in which character he was known to be travelling, and applying the rules of plain sense, the whole of the disputed articles may fairly be considered as having been at the time the personal luggage of the plaintiff.

*C. S. Patterson* and *Anderson* supported the rule. The Consol. Stat. U. C. ch. 66, sec. 99, and subsequent sections speak of the traveller's baggage, and of its being checked, &c., but nothing is said, as in the English Act, 7 & 8 Vic., ch. 85, sec. 6, of any of it being carried free. As to what baggage is, see *Angell* on Carriers, sec. 115; *Story* on Bailments, sec. 499. *The Great Northern R. W. Co. v. Shepherd*, 8 Ex. 30; *Gamble v. The Great Western R. W. Co.*, 24 U. C. R. 409; *Macrow v. The Great Western R. W. Co.*, L. R. 6 Q. B. 612, 622; *Hudston v. The Midland R. W. Co.*, L. R. 4 Q. B. 366. These cases and *Cahill v. The London and North Western R. W. Co.*, 10 C. B. N. S. 154, affirmed in 13 C. B. N. S. 818, and *Shaw v. The Grand Trunk R. W. Co.*, 7 C. P. 493, shew that the railway company are not liable as carriers for articles passed off upon them as, but which are not, personal luggage, nor for the luggage of a third person, which his servant carries as part of the servant's own luggage: *Becher v. The Great Eastern R. W. Co.*, L. R. 5 Q. B. 241. And the case of *Macrow v. The Great Western R. W. Co.*, before cited, shews that what is personal or ordinary luggage is for the Court, and not for the jury, to determine. The plaintiff clearly cannot recover the value of the goods which were not personal luggage, and these cases sustain the objections to the articles objected to. But the plaintiff is not entitled to recover at all, although a portion of the goods in the box may have been personal luggage. The contract was entire,

to carry the box, as luggage ; and if there were articles in it which were not of that description, the defendants never contracted, and never were bound to carry it at all, The defendants were induced to take the articles not personal luggage by their being concealed. They would not otherwise have taken them, and the risk on what they should carry may in such a case be doubled by the other goods being improperly added. Their liability arises under the statute ; and they can be made liable for nothing which by the Act they were not bound to check : Consol. Stat. C. ch. 66, sec. 99 : *Batson v. Donovan*, 4 B. & Al. 21. Had they been told the contents of this box they would not have checked it ; and having thus been deceived into taking it, they were not bound to carry it safely : *Sleat v. Fagg*, 5 B. & Al. 342. There was in this case no misfeasance by defendants. They did not lose the box. It was carried, for the reasons just given, at the plaintiff's risk, and to make defendants liable he must shew clearly some act of misconduct on their part ; mere neglect by them will not suffice in such a case. The two cases last referred to are applicable to this part of the argument, and also *Cahill v. London and North Western R. W. Co.*, 13 C. B. N. S. 818. The presumption is, that the box came to Toronto, and was put upon the station platform, at which time the defendants' duty as carriers strictly ceased, and that presumption applies with greater force when the box was carried at the risk of the plaintiff. The Company do not and are not obliged to store goods which they carry as personal luggage. The plaintiff should have attended to receive his luggage on the arrival of the train, but he left it uncared for for several hours while he was idling about Toronto. This may have occasioned the loss, and it lay upon him to shew not only a *primâ facie* but a positive case of misfeasance against the defendants, which he did not do.

WILSON, J.—The authorities and references shew it is much easier to say what is not personal or ordinary luggage, than it is to decide what is, which a carrier is bound,



or which it is usual for him, to carry along with his passenger. Personal luggage "is not merchandise or materials bought for the purpose of being manufactured and sold at a profit:" per Parke, B., in the *Great Northern R. W. Co. v. Shepherd*, 8 Ex. 30, 38. Nor merchandise or other valuables which are not designed for personal convenience, such as are usually carried by passengers for their personal use, but for other purposes such as a sale and the like: *Story on Bailments*, sec. 499.

The cases establish that articles of merchandise cannot be considered as personal luggage: per Cockburn, C. J., in *Macrow v. Great Western R. W. Co.*, L. R. 6 Q. B., at page 621.

Nor samples of merchandise carried by a commercial traveller: *Cahill v. London and North Western R. W. Co.*, 10 C. B. N. S. 154; *Hawkins v. Hoffman*, 6 Hill N. Y. Rep. 586.

Nor title deeds, nor money: *Phelps v. London and North Western R. W. Co.*, 19 C. B. N. S. 321.

Nor a spring horse for children: *Hudston v. The Midland R. W. Co.*, L. R. 4 Q. B. 366.

Nor sheets, blankets, and quilts, intended for the use of the plaintiff's household when permanently settled: *Macrow v. The Great Western R. W. Co.*, L. R. 6 Q. B. 612.

Something manifestly not for personal use, or that which a traveller would ordinarily carry for his personal comfort or convenience: per Erle, C. J., in *Phelps v. London and North Western R. W. Co.*, 19 C. B. N. S. at p. 330.

The affirmative statements of what the personal or ordinary luggage of a passenger is, are the following: It comprises clothing and such articles as a traveller usually carries with him for his personal convenience; perhaps even a small present, or a book for the journey, might be included in the term: *Great Northern R. W. Co. v. Shepherd*, 8 Ex., p. 38.

Such articles of necessity or personal convenience as are usually carried by passengers for their personal use: *Story on Bailments*, sec. 499.

That description of goods which passengers usually carry

as part of their luggage: *per* Lush, J., in *Hudston v. The Midland R. W. Co.*, L. R. 4 Q. B. p. 371. It is not confined to wearing apparel, brushes, razors, writing apparatus, and the like. If one has books for his instruction or amusement by the way, or carries his gun or fishing tackle, they would fall within the term baggage, because they are usually carried as such: *Hawkins v. Hoffman*, 6 Hill N. Y. Rep. 589. The language of Cockburn, C. J., in *Macrow v. The Great Western R. W. Co.*, L. R. 6 Q. B. 622, which has been so much referred to, is very appropriate. He says: "We hold the true rule to be, that whatever the passenger takes with him for his own personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as personal luggage. This would include, not only all articles of apparel, whether for use or ornament—leaving the carrier herein to the protection of the Carriers' Act, to which, being held to be liable in respect of passengers' luggage as a carrier of goods, he undoubtedly becomes entitled—but also the gun case or the fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveller, and the taking of which has arisen from the fact of his journeying."

This language might include the tent or boat of the sportsman, as well as his gun or fishing tackle, and may be too comprehensive. The case of *Hudston v. Midland R. W. Co.*, before mentioned, would authorize their exclusion, as that was partly decided upon the size and inconvenient shape of the spring horse, as an article of ordinary luggage. Articles of jewellery are also within the terms of the language of the extract given.

The articles of that description enumerated in the plea appear to have been for personal use.

In *Brooke v. Pickwick*, 4 Bing. 218, articles of jewellery

were held to be part of personal luggage. See also *McGill v. Rowand*, 3 Barr Penn. Rep., 451.

The revolver and rifle, I think, may also be held to be within the term personal and ordinary luggage. Such articles are very frequently carried, and are always carried when it is considered necessary for self defence, or for the protection of property. If they may be carried by the sportsman, so may they also be carried by persons competing at shooting matches, or by the owner when he is moving from one part of the country to another.

The cases of *Porter v. Hildebrand*, 2 Harris Penn. Rep. 129, and *Woods v. Devin*, 13 Illinois 746, shew, the former that carpenters' tools, to a reasonable amount, taken by the plaintiff, a carpenter, along with his clothing, are recoverable for against the carrier, if lost, as necessary to his person as a traveller; the latter, that a pocket pistol and a pair of duelling pistols are within the same rule.

The concertina, being a small article, may also be counted with those articles of amusement or pleasure which it is permissible to carry as part of one's personal luggage. One person may prefer a gun, a second a fishing rod, a third a book, by way of amusement, and there is no reason why a fourth should not be indulged with a flute, a violin, or a concertina, if he desire it.

The sewing machine is not, I think, ordinary or personal luggage. It is not carried for the owner's use or convenience, but "for larger or ulterior purposes, such as articles of furniture or household goods," in the language of Cockburn, C. J., in the case so often referred to: *Macrow v. Great Western R. W. Co.*, L. R. 6 Q. B. 622; and does not, therefore, come within the description of ordinary luggage.

The only remaining articles are the carpenter's tools, consisting of saws, planes, chisels, and a variety of other useful trade articles, valued at a little more than one hundred dollars.

These do not appear to be properly personal or ordinary luggage. They are not like the gun of the sportsman, the use and the taking of which have arisen from the fact of

his journeying. They are more like articles of furniture or household goods, taken for larger and ulterior purposes. Carpenters do not commonly travel with their tools of trade. No doubt they carry them along with them when they change their home, or as they move from one job to another; but that can no more entitle them to pass off the tools of their trade as ordinary luggage, than it would warrant the blacksmith, or founder, or mechanical engineer, or farmer, from passing off theirs in like manner. Theirs may be heavier and bulkier than are those of the carpenter; but the answer is, they are all too heavy and too bulky, and they are none of them articles of ordinary and personal luggage. They are articles of trade, just as much as the farmer's plough is. That they are not for sale, is of no consequence, for neither are the samples of the merchant, and yet they are merchandise, and not personal luggage: *Hawkins v. Hoffman*, 6 Hill N. Y. Rep. 586.

In my opinion, the value placed upon the sewing machine, and upon the carpenters' tools, ought to be deducted.

I do not think that the placing of the articles which were not personal luggage in the same box with the clothing and the other articles which were personal luggage, will deprive the plaintiff of the right to recover for such of the articles as were properly the ordinary luggage of a passenger. That was the case in the *Great Northern R. W. Co. v. Shepherd*, 8 Ex. 30; and in *Cahill v. The London and North Western R. W. Co.*, 10 C. B. N. S. 154, the plaintiff failed altogether, because the box contained *only merchandise*; affirmed in 13 C. B. N. S. 818, where the same fact is again noticed.

The deduction should be made because, as to the articles which were not personal luggage, they were carried at the risk of the plaintiff, and if he desired to shift the responsibility to the defendants, he should have shewn, by affirmative testimony, that the defendants had been guilty of some plain act of misfeasance, as by destroying or converting the box, or by sending it off in some other direction. Mere negligence on their part will not enable the plaintiff



to recover for these articles. There was no contract as to them at all.

The claim made, shews that the plaintiff had, in this one box, jewellery to about the value of \$90, a concertina worth \$12.50, a sewing machine worth \$21, rifle and revolver worth \$36.50, carpenter's tools worth more than \$100, and clothing worth about \$90 ; and the evidence shewed that he had other three boxes of other articles ; and yet, by some means or other, he contrived to get the aid of the emigration society to bring himself and his wife to this country ; and it appears, also, that with some difficulty he was got to pay \$2 on account of his own fare from Montreal to this place.

It cannot be the purpose of the emigration society to aid by way of charity persons who have jewellery and concertinas to come to this country, but to help those who are really destitute. And it is not such persons as the plaintiff who should be the applicants for or the recipients of charity destined for other and more deserving persons.

This verdict cannot be affected by such considerations, but if the jury had taken an unfavorable view of his case by reason of such conduct, he would have had himself alone to blame for it.

The result is, that the verdict, which is now \$336.30, should, in my opinion, be reduced by \$21.00 for the sewing machine—less \$5.00, which the jury have already deducted from it—leaving \$16, and for the tools \$101.40 : total \$117.40, making the verdict \$218.90.

But the learned Chief Justice and my brother Morrison are of opinion that the concertina should also be disallowed, which will make a further deduction of \$12.50, and a total deduction of \$129.90, making the verdict \$206.40.

If there is any dispute as to the correctness of these figures, the true amount can be decided by a reference to the Master.

The rule will therefore be absolute to reduce the verdict to the sum of \$206.40, and it will be discharged as to the residue.

*Rule accordingly.*

## MICHAEL GREER ET UX. V. GEORGE JOHNSTON.

*Bond—Construction—Parol evidence—8 & 9 W. III. ch. 11.*

The defendant gave a bond to the plaintiff in \$1000, reciting that he had that day purchased certain land known as the mill property in the village of P., and fully described in a deed made by one J., and conditioned to convey to the plaintiff all the land in said deed over  $2\frac{1}{2}$  acres, being a strip on the western portion of the property, as soon as said land could be surveyed. The deed to J. included over four acres, part of which, at the eastern end, was covered with water. *Held*, that defendant clearly was not entitled to retain  $2\frac{1}{2}$  acres of *dry land*, in addition to that covered with water, but only  $2\frac{1}{2}$  acres of the whole. *Held*, also, that parol evidence of the expressions and declarations of the parties as to the land intended, was inadmissible to support the defendant's construction of the bond.

The verdict was taken for the plaintiff for \$1000, and 20 cents for the detention, no evidence of damage having been given. Defendant moved to restrain the execution to 1s. damages, the bond being within the 8 & 9 W. III. ch. 11. *Held*, that such application, before the entry of judgment, was premature.

ACTION on a bond given by defendant to the plaintiff Margaret Greer, in the sum of \$1000, whereby—after reciting that defendant had that day purchased from the plaintiff Michael, part of 23, in the 5th concession of Georgina, known as the mill property, in the village of Pepperlaw, and fully described in a certain deed made by one Johnston to said Michael and one Evans, dated 16th November, 1857,—defendant bound himself to convey to said Margaret or her heirs all the land mentioned in said deed over  $2\frac{1}{2}$  acres, more or less, as soon as said land could be surveyed, defendant retaining for himself  $2\frac{1}{2}$  acres, and conveying the balance to said Margaret, to be composed of a strip of land on the western portion of the property, extending from King Street to the margin of the Black River. The condition was declared to be, that if defendant should fully convey and assure said lands to the said Margaret, on the first day of August then next, with usual covenants, &c., then the said bond should be void. Breach, that defendant did not on, &c., or at any time, convey or assure the said land to the said Margaret.

*Pleas*: 1. Non est factum.

2. That it was a condition precedent to the conveyance that the land should be surveyed at the joint expense of the

plaintiff Margaret and defendant: that defendant offered to have the land surveyed if she would join in the survey by sharing equally in the expense, but she wholly refused and discharged defendant.

3. That defendant having at his own expense caused a survey to be made of the land, did make and tender to the plaintiff Margaret a conveyance of all the land mentioned in the said deed over  $2\frac{1}{2}$  acres of the land therein described, being composed of such a strip of land as in the condition of the bond was mentioned, but the plaintiff Margaret refused to accept the said deed.

#### Issues.

At the trial, at Toronto, in April, 1871, before Gwynne, J., it was proved by one McCallum, a surveyor, that at the instance of the plaintiffs he made a survey of the land mentioned in the bond in May, 1869. The defendant was told by McCallum that he was going to make the survey. A deed was prepared according to this survey, for execution by defendant, in which the land was described as being part of lot number 23, in the 5th concession of the township of Georgina, containing by admeasurement two acres, three quarters, and four square perches, "commencing at a certain point in the southern limit of King Street, in the village of Pefferlaw, at the distance of three chains and ninety-four and-a-half links from where the southern limit of King Street intersects the western margin of the Black River, on a course S.  $65^{\circ}$  15' W.; thence at right angles southerly, or S.  $24^{\circ}$  45' E., five chains sixty-five links, to the northern limit of the mill pond; then following the said limit of the mill pond westerly to where it meets the western limit of the said lot number 23; then following the said western limit N.  $16^{\circ}$  W., one chain sixty links, to the portion formerly sold to one Robert Johnston; then along the eastern limit of the said Robert Johnston's property, four chains sixty-three links, to the southern limit of King Street aforesaid; then along the said limit easterly to the place of beginning." This deed was tendered for execution by the defendant on the 16th July, 1870, and he refused to execute it. The mill pond it



appeared covered land belonging to three different parties. The easterly line, according to this description, passed angling through a shed.

The defendant was sworn on his own behalf. He said he purchased this property from Michael Greer, at auction. He produced a hand-bill which he got at the sale. It described the property as "The Pefferlaw flouring and grist mill, to which is attached  $2\frac{1}{2}$  acres of land, having erected thereon a neat and comfortable cottage, and a good stable, driving-house and sheds."

He stated that he had a survey made by one Lumsden, and on the 26th July, 1869, executed a deed according to his survey, and tendered it on the 27th July. The description in this deed was as follows: "Commencing at the intersection of the southern limit of King Street, in the village of Pefferlaw, with the eastern limit of lands formerly conveyed by one James Johnston to one Robert Johnston off said lot; thence easterly along the southern limit of King Street one chain and sixty-two links; thence southerly, at right angles to King Street, five chains and ninety-two links, more or less, to the margin of the water of the mill-pond; thence westerly, along the margin of the mill pond, three chains, more or less, to the western limit of said lot number 23; thence northerly, along the western limit of said lot, one chain forty links, more or less, to lands formerly conveyed by one James Johnston as aforesaid off said lot; thence northerly along the eastern limit of land formerly conveyed by the aforesaid James Johnston to the aforesaid Robert Johnston, four chains sixty links, more or less, to the place of beginning."

In speaking of the arrangement, the defendant said that he proposed that the instrument should be worded, that Mrs. Greer was to have the balance over  $2\frac{1}{2}$  acres; he supposed the property in all comprised three acres, and so that Mrs. Greer would have only half an acre. He said what he called land was dry land. He said he objected to McCallum making the survey: he admitted his capability, but wanted to get some one else to do it. *Lumsden*, the sur-



veyor, was also called, and said he made the survey without any deed at all; he just laid off  $2\frac{1}{2}$  acres of dry land; they were talking of an arbitration, and he said to defendant he would lay off  $2\frac{1}{2}$  acres of dry land, so that the arbitrators might see the difference between that and McCallum's survey. This witness was asked to read the description in the deed of 15th November, 1857, and said that as a surveyor, comparing that with the bond, if called upon to lay off the  $2\frac{1}{2}$  acres, he would lay them off differently, and would have included the pond in the survey of the  $2\frac{1}{2}$  acres.

The deed of 16th November, 1867, to George Evans and the plaintiff Michael, described the land thus: that part of number 23 which lies west of the Black River, and south of the road running through the lot, known as King Street, on a plan of the village of Pepperlaw made by James McCallum, junior, except that parcel of the land formerly conveyed by the said James Johnston to one Robert Johnston, together with the grist mill and all other buildings thereon, and all the water power and privileges thereto now pertaining, and all machinery.

The verdict was given for the plaintiff for \$1000, and 20 cents for detention, with leave to defendant to move to set it aside and enter a verdict for defendant or a nonsuit, if the Court, who should have power to draw inferences as a jury, should so direct. The learned Judge pointed out that no evidence of damage was given, but the plaintiff's counsel elected to take the verdict as above.

In Easter Term last, *Harrison, Q. C.*, obtained a rule *nisi* to enter a nonsuit or a verdict for defendant, on the leave reserved; or for a new trial, for the improper rejection of evidence of admissions made by Michael Greer after the execution of the bond, as to the land intended by the said bond, and because the verdict is contrary to law and evidence; or why any execution to be issued on the judgment to be entered in this cause should not be restrained to 1s. damages, the bond being within the Statute 8 & 9 Wm. III. ch. 11, and no greater damages being assessed.

During this term *M. C. Cameron*, Q. C., shewed cause.

*Harrison*, Q. C., supported the rule. He cited, as to the construction of the bond, *Buffalo and Lake Huron R. W. Co. v. Corporation of Goderich*, 21 U. C. R. 97; *Regina v. Peto*, 7 W. R. 586, 5 Jur. N. S. 1209; as to the admissibility of evidence, *Bambridge v. Wade*, 16 Q. B. 89; *Doe dem. Freeland v. Burt*, 1 T. R. 701; *Harrison v. Barton*, 30 L. J. Chy. 213, 7 Jur. N. S. 19; *Gordon v. Gordon*, L. R. 5 H. L. 254; *Baldwin v. Carter*, 17 Conn. 201; as to the application to restrain execution, *Drage v. Brand*, 2 Wils. 377; *Goodwin v. Crowle*, Cowp. 357; *Hardy v. Bern*, 5 T. R. 636; *Roles v. Rosewell*, Ib. 538; *Montgomery v. Blackwood*, 7 Ir. L. R. 428; *Stratton v. Codd*, 9 Ir. L. R. 1; *Bank of Mount Pleasant v. Sprigg*, 1 McLean 178; *Massey v. Schott*, 1 Peters C. C. Rep. 132.

DRAPER, C. J. OF APPEAL, delivered the judgment of the Court.

The bond recites that defendant had that day purchased from the plaintiff Michael part of lot 23, in the 5th concession of Georgina, known as the mill property in the village of Pfefferlaw, and fully described in a deed made by one Johnston to the plaintiff Michael and one Evans, dated 16th November, 1857. The description therein given is adopted by both parties as precisely defining what they intended and understood to be the mill property, and it included land covered with water and land not so covered, together exceeding four acres. After the recital the defendant binds himself to convey to the plaintiff Margaret, or her heirs, *all the land mentioned in said deed* over  $2\frac{1}{2}$  acres, as soon as said land could be surveyed.

The defendant claims that the  $2\frac{1}{2}$  acres, to which quantity he is limited, must be dry land, and that the land covered with water, part of that described in the deed of November, 1857, which is on the eastern part of the mill property, is not to be taken into account in ascertaining the strip of land on the western portion to be conveyed by him to the plaintiff Margaret.

Confining attention to this deed and the condition of the bond, we can find not even a plausible reason for construing the word "land" as meaning all the land, wet or dry, which is within the boundaries mentioned in the former, and for construing the same word land in the latter as meaning dry land only when the  $2\frac{1}{2}$  acres are mentioned. Even Lumsden, the surveyor employed by defendant, cannot, after reading the deed of November, 1857, support that contention. The two cases cited by the defendant's counsel have no application to the present case, from the wide difference in the facts: *Buffalo and Lake Huron R. W. Co. v. Corporation of Goderich*, 21 U. C. R. 97; *Regina v. Peto*, 7 W. R. 586; 5 Jur. N. S. 1209. See also *Regina v. Overseers of Neath*, L. R. 6 Q. B. 707.

It was further urged that the word "land," might be explained by the expressions and declarations of the parties; but in *Harrison v. Barton*, one of the cases cited for the proposition, V. C. Wood says, in reference to that case, "Parol testimony must be at all events limited, as it is limited in other cases of a like character, where an instrument in writing is sought to be varied; that is to say, the evidence must be confined to facts, and must not go to statements of intention. Parol evidence of a person saying, 'I intended it so,' or 'I intended this, that, or the other,' is inadmissible."

*Gordon v. Gordon*, L. R. 5 Eng. & Ir. App. 254, was also cited. The principle there asserted was, that in construing a will, if the words used are themselves of doubtful meaning, the circumstances of the case may be referred to for the purpose of assisting in the explanation. But that principle does not apply here.

In *Bainbridge v. Wade*, 16 Q. B. 89, Lord Campbell says, "No one will contend that the effect of a written instrument can be varied by oral evidence. All that is permitted is, to shew in what sense words are used, by shewing what the situation of the parties was at the time."

In our opinion, therefore, the application for a nonsuit or to enter a verdict for defendant fails; and we think there should be no new trial, for we do not think there was any imsdirection.

The last point in the rule is the application to restrain any execution to be issued on the judgment to be entered in this cause to 1s. damages, the bond being within the Statute 8 & 9 Wm. III. ch. 11, and no greater damages being assessed.

The application is premature. The execution must be preceded by the entry of judgment, and whatever may be assumed in the present state of the cause as to the form of that entry, we cannot determine what course the plaintiff may take to relieve herself from difficulty, if she finds that there exists one in the way of recovering the satisfaction to which she is apparently entitled. We have no doubt whatever that the bond is within the Statute of William referred to.

*Rule discharged.*

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#### BURNHAM ET AL. V. JONES.

##### *Ejectment—Service of summons—Parties.*

A summons in ejectment was sued out against defendant, J., on the 20th January, 1871, and served, 1. By nailing a copy to a tree upon the land, which was a wild lot. 2. By serving a copy on defendant's brother, who was not shewn to be defendant's agent or authorized to accept service for him. 3. By serving a copy on one E at defendant's late residence. Upon these affidavits an order was made authorizing the plaintiff to proceed by signing judgment for want of appearance, which was done on the 27th of April. Defendant had been in England since December, 1870, and having returned in July, he moved in the next term to set aside the order and judgment signed under it, on affidavit denying that he had ever had possession of the land either by himself or others.

*Held*, that the rule must be absolute: that it was a case of vacant possession, but no reason was shewn for making J. a defendant, and no service binding upon him.

*Beverley Jones* obtained a rule during this term in the Practice Court calling on the plaintiff to shew cause before this Court why the order made herein, on the 13th September last by the Clerk of the Crown in Chambers, discharging a summons herein issued, should not be rescinded.

An ejectment summons was sued out by the plaintiff against the defendant, tested 20th January, 1871, to recover 48 acres of the west half of lot 31 in the 5th concession of Nottawasaga.



An affidavit was made on the 11th March, 1871, that the deponent, on the 10th March, 1871, served the defendant with a true copy of the writ "by nailing on a tree said copy on the lot mentioned in the writ, and there leaving said copy, as there was no tenant or occupant on said lot."

Another affidavit stated that the deponent on the 14th March, 1871, personally served Jonas ap Jones, a brother of the defendant, with a true copy of the writ of ejectment, on which writ and on the said copy was endorsed a notice of the name and residence of the attorney who issued the same.

A third affidavit stated that the deponent on the 14th March, 1871, personally served R. Elmsley, a grown-up person, in the late residence of Edward C. Jones, the defendant, indorsed, &c.

A fourth affidavit stated that the deponent was informed and believed that the defendant then (8th April, 1871,) resided in some part of England, out of the jurisdiction, &c., and that defendant was not resident within such jurisdiction at the time of issuing the writ of ejectment.

A fifth affidavit stated that the deponent, who put up a copy of the writ on a tree, made diligent search at that time about the said land and premises, and that there was no house or building of any sort whatever on the said lot, "which was a wild one."

This was the plaintiffs' case supporting their judgment.

On the 3rd of August, 1871, defendant made an affidavit, stating that on the 14th of the preceding month he first learned that this action had been brought, and that a copy of the writ of ejectment had been served upon Mr. Jonas ap Jones as service upon defendant: that he had been living in England since last December, and returned to Canada on the 14th July: that on the 3rd of August he first learned that judgment in ejectment had been recovered on the 27th April, 1871: that he never was in possession of the land described in said writ by himself or his tenant, nor was any one on his behalf, but he believed the land had always

been unoccupied and in a state of nature : that he was never served with the writ, nor was any one authorized to accept service for him.

Another affidavit put in on behalf of defendant stated that on the 3rd of August last deponent searched and found that judgment was signed in this cause on the 27th April last : that deponent searched in the office of the Clerk of this Court, and found that no judgments had been returned from the deputy Clerk of the Crown at Barrie for six months and upwards, and that this judgment was not returned until after an application to said deputy Clerk.

This affidavit further stated that on the 26th of April last an order was made by the Clerk of the Crown and Pleas in the Queen's Bench, founded on the affidavits on behalf of the plaintiffs above set forth, allowing the plaintiffs to proceed in this cause by signing final judgment against the defendant for want of appearance.

On the 4th of August, 1871, a summons was issued calling on the plaintiff to shew cause why the writ of ejectment, the order allowing the claimants to sign judgment, and the judgment itself, should not be set aside, with costs, on the grounds : 1. That the defendant was never, by himself or his tenants, or any one on his behalf, in possession or occupation of the land. 2. That it is not shewn the writ was served on the tenant in possession. 3. That it was not shewn that defendant had ever been in possession of the premises, and had abandoned such possession, but it appeared the lot was unoccupied and wild. 4. That the order was not obtained upon a rule *nisi* or summons first issued, with special directions as to its service. 5. That the judgment is irregular in being signed against defendant, who never was in possession.

On the 13th September, 1871, this summons was discharged with costs, and thereafter this rule was issued.

*Beverley Jones* moved the rule absolute, citing *Wallace v. Acre*, 5 P. R. 142.

No one appeared to shew cause.

DRAPER, C. J. OF APPEAL, delivered the judgment of the Court.

It appears to us, confining attention *strictly to what the affidavits shew*, that this is a case of vacant possession. It is obviously not a case in which (as the 1st section of the Ejectment Act directs), the writ could be addressed "*to the person in possession, by name,*" though it might be properly addressed to the defendant, if it were shewn in any way that he was entitled to defend the possession of the property claimed. But no reason whatever appears in any paper or proceeding on the part of the plaintiff for selecting the name of the defendant, which would not be equally applicable to any other person who had been a resident in Ontario, and was absent from the Province; and the defendant's affidavit negating possession by himself or any one for or under him does not assert any right to the land, or to defend the possession of it; it is carefully confined to denying the plaintiff's right to make him a defendant.

In cases of vacant possession there are two points to be considered: 1st. That the person mentioned by name in the writ as a defendant or tenant in possession was properly so named therein. 2nd. That the possession was vacant within the meaning of the Act: *Cole on Ejectment* 110. Admitting the latter to be established, the plaintiff has wholly overlooked the former.

But the plaintiffs also assert service of a substituted character. One affidavit states it was made on a brother of the defendant, not upon the premises in question, and without asserting that the brother was either general or special agent of the defendant. Another affidavit states a service on a grown up person, naming him, not on the premises in question, but at the late residence of the defendant, not saying where, nor shewing any kind of privity as agent or servant of, or person left in charge by the defendant; and one affidavit put in by the plaintiffs asserts on information and belief that the defendant was residing in England at the time of the alleged services.

We think none of the affidavits shew that the defendant's

name was properly introduced into the writ as the person in possession of this wild lot, though actual occupation would be unnecessary to be proved. Something more should appear than the mere fact that the writ is addressed to him, especially where there has been no personal service.

We think, also, there was no proof of service other than personal, which is binding on the defendant, and it is not pretended that he was served personally.

And in our opinion the rule *nisi* should be made absolute with costs.

*Rule absolute.*

### KEMPSTER ET AL. V. THE BANK OF MONTREAL.

*Declaration on indenture—Plea, setting it out in full—Demurrer—Building contract—Construction.*

The plaintiffs declared on a building contract under seal, by which they covenanted to do certain work for defendants, to be paid for as the work should progress upon the written certificates of the overseer in charge; and they averred that defendants covenanted by it that the overseer should give such certificates when the plaintiffs were entitled thereto, alleging a breach of this covenant by defendants.

Defendants pleaded that the agreement was as follows, setting it out verbatim, and making no further averment; to which the plaintiffs demurred.

*Held*, that defendants had taken the right course in so pleading: that the plaintiffs by demurring had admitted the contract declared on to be as alleged in the plea; and that the question, whether it sustained the declaration, was thus properly raised.

The contract was for the performance of certain specified work at a price named, in conformity with the instructions of one H. the overseer of the works. By it H. was made the sole judge as to the state and completion of the work, and generally as to any question arising under the contract; he was empowered to reject any materials which he might think unfit, to employ others in the event of the plaintiffs not using sufficient despatch, and no payments were to be made without his written certificate:

*Held*, that there was clearly no such covenant by defendants as alleged in the declaration, and that they were entitled therefore to judgment upon the demurrer.

**DECLARATION.** First count: that by indenture between the plaintiffs and defendants, defendants covenanted and agreed that if the plaintiffs would execute and complete as specified therein, and in the drawings and specifications therein



mentioned, certain specified alterations and additions to defendants' banking house in Hamilton, defendants would pay plaintiffs \$4937, by payments from time to time as the work should progress: that at any time during such progress the defendants might make alterations, by way of additions or reductions, and would, if additions were made, pay the plaintiffs the value thereof, to be fixed by the defendants' overseer of the works, one Albert H. Hills, according to the prices on which the plaintiffs' estimate was originally made: that it was further agreed that the plaintiffs should complete the works in conformity with the general instructions of defendants' said overseer, and that no payment was to be made without a written certificate of the overseer, stating the value of the unpaid-for works then done by the plaintiff, and the amount to be paid; and that the defendants would procure the overseer to, and that he would, whenever the plaintiffs were entitled to any such certificates, give them in writing, stating in each the true value as agreed upon; and that as to all alterations and additions, defendants would procure the overseer to, and that he would estimate all such extra works: that the plaintiffs did valuable portions of the works originally contracted for, except some portions which defendants through their said overseer and agent in that behalf prevented, by making, through their overseer and agent in that behalf, extensive alterations and additions to the original contract: that the plaintiffs by the instructions of the overseer did large portions of, and all of such alterations in, and additions to, the original work, except some portions of the extra work, which defendants, through their overseer and agent in that behalf, prevented them from performing by wrongfully discharging the plaintiffs and forcibly excluding them from the defendants' banking house, and from the whole of the works: that defendants before the commencement of this suit accepted all the plaintiffs' work and converted it to their own use, and have paid the plaintiffs in all \$4,450, the value of the whole being \$7,000: that except so far as they were hindered as

aforesaid, the plaintiffs have performed all conditions precedent, and all things have been done to entitle the plaintiffs to the certificates of the overseer for all done by them on the original contract, and to have the alterations and additions valued, and to entitle the plaintiffs to be paid ; yet defendants have not procured their overseer to give, nor has he given the plaintiffs certificates in writing in respect thereof, but has only given the plaintiffs certificates for portions of what they did, and defendants have not procured the overseer to value, nor has he valued, the extra work, and defendants have not paid plaintiffs the prices agreed upon for what the plaintiffs did of the original and extra works.

Common counts were added.

Pleas to the first count : 1. That the indenture alleged is not their deed ; 2. That the indenture in that count mentioned was and is in the words and figures following (setting out *verbatim* the indenture, of which the material parts are sufficiently stated in the judgment,) and averring that the parties therein named of the first part are the defendants, and the parties therein named of the second part, the plaintiffs in this suit.

The plaintiffs demurred to the second plea to the first count, assigning for causes, 1. That such second plea confesses, without avoiding, the causes of action to which it is pleaded ; 2. That such second plea merely sets out *verbatim* the indenture which contains the contract, and the implied and other covenants in respect thereof, of the plaintiffs and defendants, without in any manner pleading, urging or disclosing any description of defence to any cause of action in such count contained.

The defendants gave notice of exception to the first count ; that they would insist that no such covenant as is in that count set forth is contained in the indenture referred to, which it is admitted is correctly set forth *verbatim* on the second plea, and that no such implied covenant as is therein alleged arises therefrom, or the agreement set forth therein ; and that no such duty as therein alleged was or is imposed on the said defendants by the indenture.

*R. Martin*, for the demurrer, cited *Young v. Austin*, L. R. 4 C. P. 553; *Ladd v. Bullen*, 10 U. C. R. 295; *Melville v. Carpenter*, 11 U. C. R. 128; *Robinson v. Davison*, 40 L. J. Ex. 172; *Lord Clifford v. Watts*, 40 L. J. C. P. 36; *Kemp v. Rose*, 4 Jur. N. S. 925; *Pawley v. Turnbull*, 7 Jur. N. S. 792; *Pilkington v. Scott*, 15 M. & W. 657; *Yates v. Law*, 25 U. C. R. 562, 569; *Scott v. Corporation of Liverpool*, 25 L. J. Chy. 227; *Bandy v. Cartwright*, 8 Ex. 913; *Randall v. Lynch*, 12 East 179; *Seddon v. Senate*, 13 East 63, 74, 77; *Appleby v. Myers*, L. R. 2 C. P. 659; *White v. Beeton*, 7 H. & N. 42; *Carpenter v. Blandford*, 8 B. & C. 577.

*Burton*, Q. C., contra, cited *Jackson v. Yeomans*, 19 C. P. 394; *Yates v. Nash*, 8 C. B. N. S. 581; *Rixon v. Emary*, L. R. 3 C. P. 546; *Clarke v. Watson*, 18 C. B. N. S. 278; *Grafton v. Eastern Counties R. W. Co.*, 8 Ex. 699; *Batterbury v. Vyse*, 2 H. & C. 42; *Ranger v. Great Western R. W. Co.*, 5 H. L. Cas. 73; *Munro v. Butt*, 8 E. & B. 738; *Thames Iron Works Co. v. Royal Mail Steam Packet Co.*, 8 Jur. N. S. 100; *Morgan v. Birnie*, 9 Bing. 672; *Scott v. Corporation of Liverpool*, 1 Giff. 216.

DRAPER, C. J. OF APPEAL, delivered the judgment of the Court.

It appears to me that, very possibly, under the plea of *non est factum* the defendants might substantially get all the benefit they seek, under the plea demurred to: *Smith v. Scott*, 6 C. B. N. S. 771.

Here, however, the defendants seek to gain the advantage of bringing the matter before the Court, without incurring the trouble and expense of going down to trial.

Under the old form of pleading, if any part of the deed were omitted in the declaration, which the defendant conceived would, if shewn, induce the Court to construe the deed in his favour in point of law, and decide against the plaintiff, the proper mode was for the defendant to prayoyer, and after setting the deed out *in hæc verba*, to demur, as he was thereby enabled to compare one part of the deed



with another, and from the whole context to explain and shew the intention of the parties, or the legal effect of the deed : 2 Wms. Saund. 366, note (1.)

The defendant has, in our opinion, under the new forms and practice, a right to set out as his defence the deed upon which, as he understands, the plaintiff declares. The observation of Jervis, C. J. in *Sim v. Edmands*, 15 C. B. 242, seems to uphold that conclusion. There the defendant, in an action on an award, pleaded setting out the award verbatim, and then demurred, and the plaintiff joined in demurrer. His Lordship observed that the rule of pleading always was, that you could not demur to a declaration, because the plea shews something which makes the declaration untenable, except in the case of oyer ; and he adds, in effect, that if the plea had concluded otherwise than as a demurrer, the plaintiff might have demurred or taken issue. And Maule, J., says : "The Legislature did not mean to alter the substance of the law, enabling a defendant to get the document set out *in extenso*, in substitution for the statement of it in the declaration. But the statute has so far altered the rule of pleading, that it is subject to an allegation and to proof that it *is* the document alleged."

We think the defendant here has taken the right course, and the plaintiff, by demurring, has admitted that the deed pleaded is the deed declared on. The Court now can determine whether it sustains the declaration or no.

The case of *Yates v. Nash*, 8 C. B. N. S. 581, is an affirmation of a similar course of pleading.

Then arises the question whether the plea displaces the declaration, and we are clearly of opinion that it does.

The declaration, after stating that Hills was named in the deed as the defendants' overseer, and that it was by the deed agreed that no payment was to be made by the defendants to the plaintiff, without Hill's written certificate, stating certain particulars, further says, as part of the agreement, that defendants should procure him (Hills) to, and that he should, whenever the plaintiffs were entitled



for work done, &c., to have a certificate, give them one. They also aver that defendants prevented them from doing portions of the work as at first contracted for, by, (through their said overseer and agent, and that the plaintiffs were also prevented from doing portions of the extra work by the defendants, through their said overseer and agent wrongfully discharging them, and forcibly excluding them from the premises on which the work was done, or was to be done, thus representing Hills to be the overseer or agent of the defendants, and as under their control as to this part of the contract as to payment. And the breach assigned is, that defendants have not procured Hills to give the plaintiffs certificates in writing in respect of the work originally contracted for, and that Hills has only given to the plaintiffs certificates for a portion of that work; and they charge a similar breach on defendants in not procuring Hills to estimate and value extra work; and further, that defendants have not paid plaintiffs the prices for what they did of the original or extra work.

Now the contract set out in the plea states that, in consideration of \$4,937 to be paid to the plaintiffs, they covenanted with defendants to execute and complete by the 1st March, 1871, the erection of certain additions to defendants' banking house at Hamilton, and all other alterations and repairs thereto, being the work mentioned and described in the specifications and drawings referred to in the recital to the said indenture, and such other works as were necessarily implied in, or might be reasonably inferred from, said specifications and drawings; and the plaintiffs admitted such specifications and drawings to be all sufficient for the substantial erection and completion of said buildings, &c., and agreed to execute the same in conformity with the same, and the general instructions of Hills, who it was recited was the overseer of the said buildings, &c. Very extensive powers were conferred by the indenture upon Hills as to the rejection of materials provided by the plaintiffs which he might think unfit, and as to the taking down and replacing by the plaintiffs of any part of the works which he

thought improperly executed, without extra allowance to the plaintiffs; and it was agreed that the decision of Hills, with respect as well to the state as to the completion of the said buildings or works, or of any portion thereof, and also with respect to every question which might arise concerning the meaning or effect of the specifications and drawings, should be final and binding upon the plaintiffs: that on all matters connected with said works reference to any other person than Hills should not be admitted in any way; and that should any doubts arise during the execution of the works, or at measuring the extras, or at making out the accounts as to any extras or other works for which the plaintiffs may consider they have a claim above the sum stated, the admission or allowance of any such claim shall be determined and adjusted by Hills, without reference in any way to any other person. And the plaintiffs agree that on their failure to complete and deliver up, by the said 1st of March, the building and works, they will forfeit and pay \$25 for every week that may elapse between such completion and the said 1st of March; and that if, during the progress of the works, the plaintiffs should fail in any way in the performance of the contract, or not use such despatch as Hills shall consider necessary, or at any time after the period for finishing such work has expired, the defendants and Hills, and either of them, is authorized to take possession of the works, to procure materials, and to employ other persons to complete the same, notice in writing being given to the plaintiffs six days before; and that the plaintiffs shall, in every particular, comply with, perform and fulfil the clauses, agreements, and stipulations in the indenture contained, and in the said specifications, plans, and drawings referred to; in consideration whereof, defendants agreed to make payments from time to time, as the works progressed, at the rate of eighty per cent. for the amount of work actually fixed in its place; but no payment shall be made without a written certificate from Hills, stating the value of the work then completed, and the amount to be paid therefor. And it was further

agreed that a balance of twenty per cent. should remain in the hands of the defendants as a security for the finishing of the building or works, and as a guarantee for the good quality thereof, and shall remain unpaid for one calendar month next after the completion of the said works. And it was further agreed that if the defendants should, during the progress of the work, deem it proper to make either additions or reductions, they should have power so to do without avoiding this agreement, save only that such additions or reductions shall be estimated and valued by Hills according to the prices on which the estimate of the plaintiffs was originally made ; and further, that all orders for additional work shall be given by Hills in writing.

The foregoing are the principal of the provisions of the agreement of the 21st July, 1870, set out at length in the second plea, and admitted by the plaintiffs' demurrer to be the instrument declared upon.

This deed or agreement differs widely from that which is stated in the declaration. It negatives the alleged position of Hills, viz., that of defendants' agent, if, as would appear from the reiteration of that term, the plaintiff means that Hills had any other or different authority than is given him by the agreement, of overseer of the alterations and additions to be made to the defendants' banking house in Hamilton. It contains no covenant or agreement on the part of the defendants that they would cause or procure Hills to give the necessary certificates to entitle the plaintiffs to demand any payment, or would cause or procure Hills to estimate the value of extra work done ; and therefore, so far as express covenant goes, the defendants have committed no breach in not procuring Hills to do either of these acts, the performing or withholding which were among the matters to be determined and adjusted by Hills without reference in any way to any other person. And the deed does not afford any pretext for implying such an agreement or duty on the part of the defendants, for there are express stipulations as to the giving of such certificates and making of such estimates, and no implication can arise where the

contract is fully set out, for it would be at variance with what is fully set out. It is beyond doubt that both parties, as is said by Hannen, J., in *Jones v. St. John's College*, L. R. 6 Q. B., at p. 127, intended "to rely on the fairness as well as the skill and judgment of" the surveyor, Hills; and, to borrow another phrase from the same judgment, "it seems to be impossible for the English language to supply words by which a man can bind himself, if this contract does not" bind the plaintiffs.

We think there should be judgment for the defendants on this demurrer.

*Judgment for defendants.*

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IN RE CATHARINE McELROY.

*C. S. U. C. ch. 83, sec. 44.*

The 44th section of the Consol. Stat. U. C. ch. 83, "An Act respecting the assurance of estates tail," applies only to cases arising under that statute, and does not authorize the Court, in every case where a husband is living apart from his wife, to dispense with his concurrence in a conveyance by her.

*John Paterson* applied for a rule under sec. 44 Consol. Stat. U. C. ch. 83, to allow Catharine McElroy to execute a mortgage without the concurrence of her husband, on the south east quarter of lot 19, in the fifth concession of Adjala, for \$1500.

The facts are sufficiently stated in the judgment of the Court delivered by

DRAPER, C. J. OF APPEAL.—This is an application presented under the 44th section of the Consol. Stat. U. C., ch. 83., which enacts that "If a husband, in consequence of being a lunatic, idiot, or of unsound mind, and whether he has been found such by inquisition or not, or from any other cause, be incapable of executing a deed, or if his residence be not known, or he be in prison, or be living apart from his wife, either by mutual consent or by sentence of divorce, or in consequence of his being



transported beyond the seas, *or from any other cause whatsoever*;" this Court or the Court of Common Pleas may, "by an order to be made in a summary way, upon the application of the wife, and upon such evidence as to the Court seems meet, dispense with the concurrence of the husband in any case in which his concurrence is required by this act *or otherwise*; and all acts, deeds, or surrenders, done, executed or made by the wife in pursuance of such order, in regard to lands of any tenure, or in regard to money subject to be invested in the purchase of lands, shall be done, executed, or made by her in the same manner as if she were a *feme sole*, and when done," &c., "shall (but without prejudice to the rights of the husband, as then existing independently of this Act,) be as good and valid as they would have been if the husband had concurred."

The wife's affidavit states, among other things not material to be considered at the present moment, that the petitioner was married in the year 1849 to William McElroy: that about the 1st of January, 1852, William McElroy left the province to go to the United States: that in July following, the petitioner saw him at Buffalo, where she had gone to attend him in an illness: that about March, 1853, she received a letter from him, dated at Brooklin in March, 1853, wherein he stated his intention of proceeding to Australia, and since then she has had no communication with him. She further states that, in certain proceedings in the Court of Chancery, two witnesses were examined, who each swore that they knew William McElroy, and one said that he had seen him at Buffalo in March, 1866, and the other that he saw McElroy in June, 1870. Copies of the depositions in Chancery are put in, which are fully to the effect mentioned as above. The affidavit also sets forth strong circumstances entitling her to relief. The Act above referred to is intituled "An Act respecting the assurance of Estates Tail," and it is, excepting in the use of the very general words, "or be living apart from his wife ..... from any other cause whatsoever," and in the power given to the Court to dispense with the concurrence of the husband,

"in any case in which his concurrence is required by this Act, *or otherwise*," altogether confined to the purpose indicated by the title. And if, notwithstanding that language, the general object clearly appearing in and by the Act, should be held to limit the construction thereof; then, as no assurance of an estate tail is in question in this case, the order asked for cannot be granted.

Perhaps, however, it may be justly said that the whole tenor of our legislation has been to afford facilities to the conveyance by married women of their real estate, and that the Consol. Stat. U. C. ch. 73, sec. 2, enables a woman married before the 4th May, 1859, without any marriage contract or settlement, notwithstanding her coverture, to have, hold and enjoy her real estate, not on the said 4th of May taken possession of by the husband, whether belonging to her before marriage or acquired since, in as full a manner as if she were *sole*, though by section 4 of that Act no conveyance or other act of the wife in respect of her real estate shall deprive her husband of any estate he may become entitled to as tenant by the curtesy.

But it is plain this Act confers on the married woman no power to convey her real estate. The law is not altered as to the necessity of the husband's concurrence in such a conveyance.

It does not appear when the petitioner acquired the property, nor whether there was any issue of the marriage. The presumption of the husband's death does not arise if the two witnesses are to be believed.

Upon the whole, we are of opinion that the 44th section of the Act, upon which this application is grounded, is limited in operation to cases arising under that particular statute, and therefore that this application should be refused.

*Rule refused.*

## MACKLEM V. DURRANT AND GARRETT.

*Trover—Sale by one defendant forbidden by the other—Damages.*

The defendant G. and two others, having executions against W. & K., directed the seizure of certain goods. The plaintiff, to whom the goods belonged, demanded them of the bailiff, who refused to give them up. G. afterwards directed the bailiff not to sell or do anything more on his execution, but it did not appear that he told the plaintiff of this, or ordered the goods to be returned to him. The plaintiff then brought trover against the bailiff and G., and the bailiff afterwards sold the goods under the other executions, paying over no portion of the proceeds to G.

*Held*, that G. was liable for the full value of the goods, for the plaintiff's right of action accrued on the demand and refusal, and was not defeated by what took place afterwards.

FIRST count : Trover for certain goods and chattels of the plaintiff.

Second count : Trespass *de bonis asportatis* for the same property, averring a conversion.

The defendant Garrett pleaded : 1. To the whole declaration, not guilty.

2. Goods not the plaintiff's as alleged.

Defendant Durrant pleaded, to the whole declaration, not guilty, by Consol. Stat. U. C. ch. 19, secs. 193, 194.

The cause was tried before Wilson, J., without a jury, at St. Thomas, in the fall of 1870.

The plaintiff, it appeared, purchased the goods from one Finlay, an official assignee in insolvency of Messrs. Wood & Kirkland. The sale was made to the plaintiff in 1866, with the assent of both Wood & Kirkland. Some litigation subsequently occurred, in which the assignment to Finlay was said to have been held void, because he was an official assignee appointed for the City of Hamilton, and not for the county in which Wood & Kirkland resided.

The defendant Garrett, one McCausland, and one Campbell had each demands against Wood & Kirkland. McCausland's judgment was recovered in March, 1867, against Wood for a debt of the firm, and the execution was placed in the defendant Durrant's hands on the same day. Judgments against Wood for the partnership debts were also recovered by Garrett and Campbell respectively on the

8th May, 1867, and executions were placed in Durrant's hands on the following day.

According to the indorsements on the writs a levy was made on the 7th March, on certain property under McCausland's execution, and on the 9th May on property on Campbell's and Garrett's executions. The property specified under the last two executions was precisely the same, except that on the one in favor of Campbell the words "and all other property liable to seizure" were written, in addition to the specific property, such as carriage, piano forte, chairs, &c., which were mentioned in both the indorsements, and the words quoted were erased in the indorsement on the execution in favor of Garrett.

There was evidence given on the trial to shew that these parties obtained their judgments in the Division Court with a view of enforcing them against the property that had belonged to the firm of Wood & Kirkland, and that they had been advised that the assignment was not good, and that they could seize the property sold by the assignee to satisfy their executions.

The goods, according to a memorandum signed by Durrant, were seized on the 13th May, 1867, and advertized for sale on the 22nd May. On that day a notice was given to the bailiff forbidding the sale and demanding the goods.

The plaintiff said that defendant Garrett told him, when he heard the assignment was bad, that he was going to sue Wood and Kirkland, and seize on any of the goods that had belonged to them.

On the 25th of May, as defendant Garrett said, according to a previous arrangement between Durrant, Campbell, McCausland, and himself, he signed a bond to indemnify Durrant for seizing and selling the property seized. Campbell also signed it, but McCausland refused to sign as a party, on which defendant and Campbell declined to be responsible, and forbid Durrant from selling the goods on their account; and afterwards, on the same day, when the goods were offered for sale, both Campbell and Garrett forbade the bailiff Durrant selling on their account. Garrett said he forbade



him acting or having any thing more to do with the matter on his execution.

The bond recited the judgments respectively in favor of Garrett, Campbell, and McCausland, and the issue of the warrants of execution thereon and placing the same in Durrant's hands, as bailiff, for execution, and that "he hath endeavoured to seize and take all the property, personal estate, and effects of the said Wood and Kirkland, and is about to take possession of the goods, chattels, and effects, described" in such schedules respectively, amongst others. One of the schedules mentioned the property in relation to which this suit was brought. The bond then recited that Durrant, at the request of the parties, had consented, upon being properly indemnified, to seize, take possession of, and sell the goods.

After being forbidden to sell the goods, the bailiff retained them for more than a year, and after the commencement of this action sold them. None of the proceeds were paid over to the defendant Garrett.

The learned Judge, sitting as a jury, found that at the time the bond was given, on the 25th May, Durrant had seized, and had the goods then in his possession, and that as far as the bond was concerned it did not authorize the prior act of seizure; but that the recitals in it, and the signing of it by the defendant Garrett, might to some extent confirm other doubtful evidence against him. On the whole, he thought the defendant Garrett liable for the seizure of the plaintiff's goods, and for the detention until the 25th of May, when he directed the bailiff not to proceed upon his execution, but not for subsequent damages. He was of opinion that Durrant and the other execution creditors were alone responsible for the subsequent detainer and sale of the goods; but if it should be considered that Garrett was liable for the subsequent detention also, then he found the whole damage against him and Durrant jointly, \$381.50.

He assessed the damages against Garrett alone at \$50, and against Durrant at \$381.50, with leave to the plaintiff to move to increase the damages against Garrett to \$381.50,

if the Court should be of opinion that Garrett, being liable for the original trespass, was liable for all Durrant did after that with the goods, or was bound to see they were safely restored to the plaintiff. And the defendants had leave to move to enter a nonsuit or a verdict in their favor, on any points which the evidence might enable them to raise.

In Michaelmas Term, 1870, *Meredith*, for the plaintiff, obtained a rule *nisi* to increase the verdict and damages against the defendant Garrett to \$381.50, pursuant to leave reserved, on the ground that the plaintiff was entitled to recover against him the full value of the goods seized by his direction.

*C. Robinson*, Q. C., pursuant to leave reserved, obtained a rule *nisi* to enter a nonsuit or verdict for defendants.

During the same term both rules were argued.

*Harrison*, Q. C., for the plaintiff. The defendant Garrett is liable, having directed the seizure of the property: *Stevens v. Pennock et al.*, 30 U. C. R. 51; *Lough v. Coleman*, 29 U. C. R. 367; *Atkin v. Slater*, 1 C. & K. 356; *Burroughes v. Bayne*, 5 H. & N. 296; *Pillot v. Wilkinson*, 2 H. & C. 72. If the bailiff took the goods by order of defendant Garrett, either alone or with others, then both defendants were guilty of a joint conversion, and both are liable for the full value of the goods: *Clissold v. Machell et al.*, 25 U. C. R. 80, S. C. in Appeal, 26 U. C. R. 422; *Hill v. Goodchild*, 5 Burr. 2791; *Gregory v. Slowman*, 1 E. & B. 371; *Clark v. Newsam*, 1 Ex. 139; *Falk v. Fletcher*, 18 C. B. N. S. 403; *Chinery v. Viall*, 5 H. & N. 288.

*D. B. Read*, Q. C., and *C Robinson*, Q. C., for defendant Garrett. The weight of evidence, though it is conflicting, seems in favor of defendant Garrett so far as regards his liability for the seizure. He reaped no benefit from the improper conduct of the bailiff in selling, and he was inveigled into taking the course he is said to have taken by other parties, who might have been sued as well as he. At all events, having forbidden the sale and directed that nothing

should be done under his execution before the demand of the goods by the plaintiff from the bailiff, Garrett cannot be properly liable for the damages arising after that. The refusal to give up the goods was not authorized by him, nor was the sale, and neither was his act or the natural consequence of the seizure of the goods. The bailiff refused because he chose to hold the goods under the other executions, as he had a right to do, and he afterwards sold under them. The defendant Garrett had no power to prevent this, and he did all he could by forbidding it. It cannot be said that the sale under the other executions was the necessary result of the seizure under his. In *Hoey v. Felton*, 11 C. B. N. S. 146, the defendant wrongfully arrested and detained the plaintiff for half an hour. He might have obtained a situation if he had applied for it at two o'clock, but in consequence of being unwell from the treatment he received he did not apply until next day, and did not get the situation. In giving judgment *Erle*, C. J., said, "The wrong would not have been followed by the damage, if some facts had not intervened for which the defendant was not responsible." Here the sale was an act not authorized by Garrett, and for which he is not responsible. In *Vicars v. Wilcocks*, 8 East 1, defendant was held not liable for the wrongful act of a third party. *Johnson v. Stear*, 15 C. B. N. S. 330, shews that in trover the actual damage the plaintiff sustains by the wrongful conversion ought to be given, and this might be merely nominal. Here the actual damages the plaintiff sustained from any act of defendant Garrett was from the seizure of the goods, and the action was brought long before the sale. There was no refusal to deliver on the part of Garrett. The Courts are not inclined to consider a mere nominal conversion of goods as giving a right to recover the whole value of them, but rather that the plaintiff is only to recover the damages which he sustains from the wrongful act complained of: *Halliday v. Holgate*, L. R. 3 Ex. 299; *Donald v. Suckling*, L. R. 1 Q. B. 585. In *Aaron v. Alexander et al*, 3 Camp. 35, the plaintiff was arrested by defendants Alexander

and Crowley on a warrant, and placed in a watch house kept by the defendant Solomons, who was a constable, where he was detained all night. It turned out he was not the person named in the warrant, and he was afterwards set at liberty. Lord *Ellenborough* ruled that defendant Solomons was a trespasser, though he had no means of knowing the person named in the warrant; but as he had not been concerned in the acts of which the plaintiff principally complained, that the attention of the jury must either be confined to the imprisonment in the watch house, or there must be a verdict in favor of Solomons. Here the defendant Garrett can only properly be held liable for the taking of the goods, not for their detention or sale. In *Nicoll v. Glennie*, 1 M. & S. 588, where the bankrupts and their assignees were sued in trover for goods which the bankrupts had converted before the bankruptcy, and which the assignees refused to give up after they were appointed, the Court held a joint conversion not made out, for the assignees could never have authorized the conversion by the bankrupts, and the bankrupts did not authorize it by the assignees.

MORRISON, J., read the judgment of—

RICHARDS, C. J.—If the learned Judge, who had an opportunity of seeing the witnesses and hearing their evidence, is satisfied that the defendant Garrett, with others, authorized the bailiff, before the 22nd of May, to seize these goods on, amongst others, his own warrant of execution issued out of the Division Court, then I fail to see how on any principle he can fail to be liable to the plaintiff for the full value of the goods. The evidence as to whether the defendant Garrett authorized the seizure of any of the goods sued for is conflicting, and if the learned Judge or a jury had found that he had not authorized the seizure of these particular goods before the 25th of May, at the time of the signing of the bond by Garrett and Campbell, then I think a verdict should have been entered for the defendant Garrett.

The evidence clearly shews that when Garrett was informed that McCausland had refused to become a party to



the bond, he repudiated it and forbade the bailiff acting on his execution. I do not think a momentary recognition of a seizure, even if it had taken place, followed immediately by a repudiation of it, would make a party liable for the act of the bailiff. *Wilson et al. v. Tumman et al.*, 6 M. & G. 236, is an authority to shew that when the act of seizure was made by the bailiff without authority to make it by the defendant, a mere ratification of the seizure by such defendant, the plaintiff in the original action, would not make it a wrongful taking by the latter.

If we assume, however, that it is correctly found that the defendant Garrett did in fact authorize the original seizure, which took place about the 13th of May, then he would be liable for that. Then on the 22nd May, whilst the property was in possession of the person whom he authorized to take it, the goods were demanded by the plaintiff of that person, and he refused to give them up. Here the plaintiff's right of action was complete, and I cannot see any facts in the case that shew his right of action satisfied, or his right to recover the usual damages (the value of the goods) in trover interfered with. Garrett only forbade the bailiff doing anything under his writ on the 25th May, and there is nothing to shew that he ever informed the plaintiff that he had repudiated the proceedings of the bailiff, and directed the goods to be returned to the plaintiff, even if that would have been any answer to the action.

Take the proposition as a simple one. A defendant in an action directs a bailiff to seize the property of A, under an execution against B. Afterwards, and after a demand and refusal to deliver up the property, he discovers that there is some doubt about the matter, and he then forbids the bailiff selling the property on his execution or doing anything more under it. Nevertheless the bailiff does go on and sell the property under his execution. Is the owner of the property bound to pursue his remedy against the bailiff alone, who may perhaps be worthless, or may he not have his remedy against the party who directed the bailiff or his agent to take the goods, when the injury has in fact principally

arisen because the bailiff will not follow the directions of the man who employed him? Surely that is no fault of the plaintiff.

Then does it make any difference in principle that Garrett was one of three persons who authorized the seizure of the goods under the three different executions, and that afterwards he forbade the bailiff acting under his execution to sell, and that the bailiff went on and sold under the other executions, without returning the goods to the plaintiff, or notifying him that defendant had withdrawn his writ, if he had done so?

After the plaintiff's right of action was complete, on the demand and refusal to give up the goods, the understanding between the bailiff and Garrett could never deprive the plaintiff of his right to recover full damages. If the bailiff refused to follow his instructions, and in consequence defendant Garrett suffers, he has his remedy against him, but he cannot deprive the plaintiff of his right to recover the full value of the property which he clearly has been deprived of, and which the refusal of his agent to give up when demanded justified him in holding to be a conversion.

I infer from the evidence that the goods were not in fact sold until more than a year after they were seized, and after a verdict had been rendered in this cause for the defendants. Surely the plaintiff at the time he commenced the action after the demand and refusal, had a right to recover the value of his goods.

The authorities seem to shew that if the plaintiff is entitled to recover against these defendants jointly, the damages must be the same against both, and if the smaller damages assumed to be recoverable from the defendant Garrett is correct, either the verdict should be for him altogether, as not being concerned in all the acts that justified the verdict against the bailiff, or the verdict against the bailiff should be reduced to the damages assessed against Garrett.

In *Morris et al. v. Robinson*, 3 B. & C. 196, language was used by the Judges which would seem to shew that in an action of trover a jury might give small damages in an action against one of two different parties, because an action could

be brought against the other for converting the same goods. The learned author of *Mayne on Damages*, at p. 215, doubts the correctness of this ground for mitigating the damages in an action of trover.

In the case in 3 B. & C. one of the learned Judges said, if concurrent actions had been brought against both parties neither would be barred by the other; the jury might reasonably give small damages on the ground that an action would lie against the purchasers; but if the plaintiffs were to recover the full value of the goods in each action, a court of equity would interfere to prevent them from having double satisfaction. *Holroyd, J.*, said at p. 206 "The probability of a recovery in an action against this defendant might keep down the damages given on the count in trover." The case in which the observation quoted occurred was not one necessarily raising the point referred to, and I have not met with any other case which seems to confirm that view. See the observations on this case in *Mayne on Damages*, 40, 215.

In the more recent case of *Homer v. Mallars*, 30 L. T. Rep. 241, 16th January, 1858, the facts were as follows: On Saturday, 11th September, the plaintiff left some chandeliers in the care of the defendant. On the Monday following he demanded them again, but the defendant's wife refused to give them up. The next day or day after the action was commenced, and after service of the writ, but before declaration, defendant offered to return the chandeliers, but the offer was declined. There was £5 paid into Court, sufficient to cover any diminution in value down to the time the offer to return was made, but the plaintiff claimed as damages the value of the goods at the time of the conversion, and the learned Judge thinking that the right measure of damages, the jury found for the plaintiff £25. A motion was made to enter a verdict for defendant. The question was whether, under the circumstances, the plaintiff could compel the defendant to buy the goods. *Crompton, J.*, said: "That is the general rule; and it was on account of the hardship which that rule might occasion in some cases, that the practice was introduced of giving equitable relief under the



C. L. P. Act, 1854, sec. 78, by ordering the return." Lord Campbell, C. J., said: "It is conceded that the general rule is, that the measure of damage in trover is the value of the goods at the time of the conversion; and no authority can be found for saying that the present case is an exception to that rule." Wightman, J.: "You have bought the chandeliers." Crompton, J.: "The defendant cannot insist upon returning the goods, except under the equitable jurisdiction of the Court."

This case shews that the general doctrine of giving full damages was allowed to prevail when a bare demand and refusal was the evidence of the conversion, and when an offer to return was made within a day or two after. The offer to return however was made after the writ had been issued. Here there is no evidence of any offer to return, and there was plenty of time before the actual sale of the goods to enable the defendant to apply to the Court, if he desired it, to stay proceedings on returning the goods.

In *Keene v. Dilke*, 4 Ex. 388, the sheriff wrongfully seized furniture belonging to the plaintiff, and put a man in possession. Whilst the sheriff's officer was in possession, a gas company and a water company obtained warrants of distress against the supposed owner of the goods, and seized some of them, and in order to redeem them from the latter claims the plaintiff was forced to pay £5 19s. The defendant contended he was not liable for the wrongful act of a third party. Alderson, B., said: "The sheriff's duty was to restore the goods, and if they had been stolen whilst in his possession the damage sustained by the plaintiff would have been the amount which he was compelled to pay to get similar goods."

It was argued that here the seizure was made against the will of the defendant, and the plaintiff paid the money in his own wrong, and her only remedy was to recover back from the parties. *Rolfe, B.*, said "If a rich man seizes my goods, and while in his possession they are taken away by a pauper, who runs off with them to America, have I no other remedy but to follow and sue him there?" The Court held the plaintiff entitled to recover the amount paid to redeem the goods.



*Lough v. Coleman et al*, 29 U. C. R. 367, shews that when the plaintiffs in different suits direct the bailiff to seize and sell, they may be jointly liable, though their executions are separate, and they give separate bonds of indemnity.

On the whole, I think the rule obtained on behalf of the defendants must be discharged, and that of the plaintiff made absolute, to increase the damages against the defendant Garrett to \$381.50, pursuant to the leave reserved.

MORRISON, J., and WILSON, J., concurred.

*Rules accordingly.*

#### LEWIS V. TEALE AND McDONALD.

*Militia—Band instruments of battalion—Right of property in—Replevin for—  
Notice of action—27 Vic. ch. 3; 31 Vic. ch. 40, sec. 89.*

In replevin for certain instruments forming part of the band of a militia battalion, brought by the commanding officer, it appeared that the instruments had been purchased partly by money voted by the City corporation, partly by general subscription, and partly by donations of the officers and men of the battalion. Some difficulty having arisen amongst the officers, one defendant refused to give up the instruments, alleging his right to hold possession as being president of the band committee, and the other defendant acted with him.

- Held*, 1. That under sec. 48 of 27 Vic., ch. 3, the instruments became the property of the commanding officer, who might maintain replevin for them; and that this section, as to such property, was in no way controlled by section 47.
2. That defendants were not entitled to notice of action under 31 Vic., ch. 40, sec. 89, for that statute had no application; but that if it had there could be no right to such notice in replevin; and the finding of the jury, that defendants did not honestly believe that they had the power under the statute to do what they did, would also disentitle them to the notice.
3. Following *Deal v. Potter*, 26 U. C. R. 578, that the plaintiff was entitled to recover as damages the value of any of the goods which could not be replevied.

**REPLEVIN.** The plaintiff sued as commanding officer of the 7th battalion of the Volunteer Militia of Canada.

The declaration alleged that defendants, at the City of London, in the County of Middlesex, took the goods and property of the plaintiff, as commanding officer of the said

battalion, to wit, one tenor trombone, one B flat cornet, &c., (describing several musical instruments), and unjustly detained and still unjustly detains the same against sureties, &c., whereby the plaintiff, as such commanding officer, incurred large expenses in replacing the same by other similar goods and property, in payment of wages to, and loss of the services of, his servants employed in and about the said goods and property, and as instructors in the use thereof, and otherwise suffered damage; and the plaintiff claimed a return of the goods, or their value, and \$300 for their detention.

Defendant Teale pleaded: 1. That he did not take the goods, or any of them, as alleged. 2. Non detinet. 3. Goods not the plaintiff's as alleged.

Defendant McDonald pleaded the same pleas. Issue.

The cause was tried at the Fall Assizes for 1870, at London, before Wilson, J., when a verdict was rendered for the plaintiff, and damages were assessed at \$100.

Most of the articles, the subject of the action, were musical instruments used by the band of the battalion, of which the plaintiff was Lieutenant Colonel and commanding officer. The instruments were purchased partly by a vote of money from the City Council of the City of London, partly by subscriptions of citizens, and partly by the donations of officers and men of the battalion. Some difficulty arose amongst the officers of the battalion, and it was alleged that the defendants intended to sell the instruments and return the money to those who had originally subscribed for their purchase; and an advertisement signed by one of the defendants, offering certain of the instruments for sale, was inserted in a newspaper in London.

The defendant Teale contended that, having been appointed President of the Band Committee, he had taken possession of the instruments in that capacity, as he had a right to do. The plaintiff, as Colonel, had forbidden or postponed the meeting of the officers, at which the resolution appointing Teale president of the band committee was passed, notwithstanding the order of the Colonel. The plaintiff had

also given authority to Lieutenant Dixon on the 8th of October, to collect the band instruments, and he demanded them from both the defendants on the evening of the 9th of October. According to Dixon's evidence, both defendants said they had the instruments, fifteen in number, and they spoke as if they were acting together. McDonald said they would smash the instruments before they would give them up, or before the others should have them.

There was conflicting evidence as to the possession of the instruments, but there was plenty of evidence, if the jury relied on it, to justify them in finding that the defendants were jointly concerned in refusing to give them up. Several of the instruments were returned after the writ of replevin was issued, but six were not returned, and had not been at the time of the trial; and the jury were told, if the defendants were liable for fifteen instruments, six of them had not been returned, and their estimated value was about \$90. There was also a claim for damages in consequence of the band master, who was paid at the rate of \$50 a month, not being able to teach the band, owing to the absence of these instruments, which could not be replaced at once.

The defendants' counsel at the trial contended that no property in the articles mentioned in the declaration was proved to be in the plaintiff, under the Volunteer Militia Act, 27 Vic. ch. 3 (1863), sec. 47: that there was no general warrant authorizing this property to be held; that the 48th section must be read with the 47th; and that the instruments were the property of the officers and men of the battalion generally: that there was no evidence of a joint conversion by the defendants: that there was no evidence of a demand on McDonald when the instruments were in his possession, or under his control: that any instruments he had in his possession came there after the demand, and after the action was commenced: that under the plea of not guilty by statute defendants were entitled to a verdict, because no notice of action had been given under the act of 1868, 31 Vic. ch. 40, sec. 89: that defendants were acting

*bonâ fide*, and not in contravention of the act, and were therefore under the protection of the statute.

The learned Judge ruled that the 47th section of the statute did not apply to such property as the band instruments, and if it did there was no plea setting up the tenancy in common of defendants with the plaintiff, or the non-joinder of the rest of the regiment: that there was evidence of a joint trespass or conversion: that the parties were not entitled to notice in this action of replevin; and there was evidence that the defendants were not acting *bonâ fide*, and what they did was not done purporting to be done under the act in good faith. He gave leave to the defendants to move as to the effect of the 47th section, and as to the want of notice of action.

The jury found for the plaintiff \$100 damages, and said they connected McDonald with Teale, and that the defendants did not honestly believe that they had power to do what they did do.

In Michaelmas term, 1870, *Meredith* obtained a rule *nisi* to enter a nonsuit, or for a new trial, for misdirection, or to reduce the damages to nominal damages.

In Hilary Term last *Magee* shewed cause. The 47th section of 27 Vic. ch. 3, does not exclude the right to hold personal property, but is intended to apply to real property. The 48th section in words expressly vests such property as that now in question in the plaintiff as commanding officer of the battalion, and authorizes him to sue as such (a). The 33 Geo. III. ch. 54, in England, as to friendly societies, is somewhat similar. Sec. 47 speaks of *grants* made to the corps as a body, and says the commander in chief may prescribe on what terms and by what means such property may be held or transmitted. Section 49 refers to the commander-in-chief making by-laws for the regulation of shooting on grounds *purchased, acquired, or used*, \* \* \* under this Act. If the property is not such that the plaintiff alone could recover, defendants should have pleaded

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(a) See sections 47 and 48, set out at length in the judgment, *post*, p. 114, 115.



the non-joinder: *Cook v. Fowler et al*, 12 U. C. R. 368. The defendants are not entitled to notice of action under 31 Vic. ch. 40, sec. 89, for the jury negatived good faith, and in an action of replevin such notice is not necessary: *Edge v. Parker*, 8 B. & C. 697; *Booth v. Clive*, 10 C. B. 834; *Hughes v. Buckland*, 15 M. & W. 353; *Folger v. Minton*, 10 U. C. R. 423; *Manson v. Gurnett*, 2 P. R. 390; *Milward v. Caffin*, 2 W. Bl. 1330; *Fletcher v. Wilkins*, 6 East 283. As to the damages, special damages were laid in the declaration. The goods detained by the defendants which were not replevied, were of greater value than the damages awarded by the jury. The plaintiff expressly alleges the detention of the goods in the declaration, and it is clear that he may recover their value. *Deal v. Potter*, 26 U. C. R. 586, is an express authority. See also *Gilbert on Distress*, 144, 145, 151; *Mayne on Damages*, 228, note; *Connor v. Bentley*, 1 Jebb & Symes, Ir. Rep., 246.

*Harrison*, Q. C., contra. The 47th and 48th sections of the statute referred to, should be read together. It was not the intention of the Legislature to make the commanding officer of a battalion a corporation. Property includes personal as well as real property, and therefore section 47 means both. Section 12 refers to horses, clothing, and other personal property, which cannot be sold without leave of the officer commanding the corps; and the clothing, except of the officers, is declared to be the property of the Crown. Sub-section 2 of section 16 authorizes the Commander-in-Chief to grant a sum not exceeding \$400 for the general purposes of a battalion, and the Commander-in-Chief may also state the condition required of the clothing, arms, accoutrements, and equipment in the possession of, or of the other property of the corps. Sub-section 2 of section 21, permits a volunteer to quit his corps on doing several things, amongst which is delivering up in good order, &c., all uniform, clothing, arms, accoutrements, and appointments, being the property of the Crown or of his corps, issued to him. Nothing is said about lands in any of these sections.

The defendants are entitled to set up the statute. The action is for something purporting to be done in contravention of the Act; and the 31 Vic. ch. 40, sec. 89, provides that any action for anything *in contravention* to the Act shall be laid in the County where the act complained of was done, and shall not be commenced after six months from the date of such contravention, and in any such action the defendant may plead the general issue, and give the act and the special matter in evidence at the trial. By sub-sec. 2 no action or prosecution shall be brought against any officer or person, for anything purporting to be done under the authority of this Act, until a month's notice in writing of the action or prosecution has been served upon him. It is said that in replevin no notice of action is necessary; but the two decisions cited, *Folger v. Minton*, 10 U. C. R. 423, and *Manson v. Gurnett*, 2 P. R. 390, were both before the 23 Vic., ch. 45, which expressly allowed damages to be recovered in replevin, and one reason for the decisions was, that it was not an action for damages. Before 23 Vic. ch. 45 damages could not be recovered in replevin: *Braman v. Shearman*, 2 Ir. Jur. N. S. 310; *Brunker's Digest* 1903, 1916. In *Bletcher v. Burn*, 24 U. C. R. 264, it is said that that statute gives no new right to damages. See also *Crawford v. Thomas*, 7 C. P. 63; *Henderson v. Sills*, 8 C. P. 72; *Waters v. Ruddell*, 11 U. C. R. 181; *Deal v. Potter*, 26 U. C. R. 578. The damages recovered in this case are at all events too remote: *Hughes v. Quentin*, 8 C. & P. 703.

The defendants were joint owners of the instruments with the other officers and men of the regiment. Trespass or trover would not lie under these circumstances, nor will replevin: *Mayhew v. Herrick*, 7 C. B. 249; *Heath v. Hubbard*, 4 East 121; *Reeves v. Morris*, 2 Ir. L. R. 309, 3 Ir. L. R. 484.

MORRISON, J., read the judgment of—

RICHARDS, C. J.—The 47th section of the Volunteer Militia Act of 1863 provides that “the several corps or bat-

talions may hold *property* for such purposes incident to their existence as the Commander-in-Chief may, by any general warrant, enumerate and prescribe; and they may pass regulations relating thereto, subject to the approval of the Commander-in-Chief, which shall be binding on the several members thereof; and all grants shall be made to the corps as a body, on the conditions that its effective members continue and remain effective in the proportion at least of three-fourths to those inscribed on the roll; and the Commander-in-Chief may prescribe on what terms or by what means and form such property may be held and transmitted."

Section 48 declares that "All money subscribed by or for the use of a volunteer corps or battalion, and all effects belonging to any such corps or battalion, or lawfully used by it, not being the property of any individual officer or volunteer, and the exclusive right to sue for and recover current subscriptions, arrears of subscriptions, and other money due to the corps or battalion, and all lands, property, or effects acquired by the corps or battalion, shall vest in the commanding officer of the corps or battalion for the time being, and his successors in office, with power for him and his successors to sue, to make contracts and conveyances, and to do all other lawful things relating thereto; and any civil or criminal proceedings taken by virtue of the present section by such commanding officer of a corps or battalion, shall not be discontinued or abated by his death, resignation, or removal from office, but may be carried on by and in the name of his successor in office; and the property of all efficient corps or battalions, their butts, and ranges, and the horses, carriages, &c., actually used for the purposes of such corps or battalions, and all armouries, drill sheds, rifle ranges, &c., however furnished, shall also be exempt from all municipal and local rates and taxes."

In the event of the Commander-in-Chief not enumerating and prescribing what property a battalion may hold, I presume that the common law rule would prevail, and that



all subscriptions of money, and money paid, or property given to or acquired for the battalion, would vest in all the officers and men composing it. Of course individual officers and men might purchase property and allow the battalion to use it whilst it was still the private property of the individual owner; but when money is subscribed for the purchase of property for the whole battalion, and such property is purchased and used for the general purposes of the battalion, then it seems to me the 48th section, by its terms, becomes operative. The very object of the section is to avoid the inconvenience of joining all the members of the battalion in an action, when proceedings are necessary to protect the property of the whole. It is analogous to an incorporated company suing by its public officer, and to friendly societies in England under 18 & 19 Vic. ch. 63, (1855), where the property of the societies is vested in the trustees for the time being, and where, by section 19, the trustees are to sue and be sued, and the action is not to be discontinued or abate by the death of the trustee or his removal from office.

I see no reason why, as to personal property bought for the use and purposes of the battalion, proceedings may not be taken in the name of the commanding officer to obtain possession of and preserve it, though the warrant referred to in the 47th section may never have been issued. The band seems to be recognized by the Legislature as a proper adjunct to an efficient corps, for in the supply bill, 32-33 Vic., ch. 1, under the head of Militia, we find a sum voted for "Contingencies and general service not otherwise provided for, including assistance to rifle associations and *bands* of efficient corps."

It seems to me this case comes within the literal words of the 48th section of 27 Vic., ch. 3, and I see no good reason why it should, as to property like that in question in this suit, be in any way controlled by the 47th section. I am therefore of opinion that the action lies at the suit of the plaintiff as commanding officer of the battalion.

Then as to notice of action. I do not understand that



the Act of 1863 contains any specific provisions as to notice of action. The Act of 1868 is referred to. Section 89 of the statute speaks of prosecutions for anything done *in contravention* to that act, or to any regulation made under the authority thereof, to be commenced within six months from the date of the contravention, and the defendant might plead the general issue, and give the Act and the special matter in evidence at the trial.

This part of the section would seem to imply proceedings against those who had violated the provisions of that Act, not actions against parties who would be amenable for some violation of law if not protected by that Act. But the concluding part of the section seems to indicate that it was intended to apply to parties who, in endeavouring or intending to carry out that Act, had been guilty of some act which that statute did not warrant, and that the section enabled them to give the special matter in evidence under the general issue; and it then proceeds, "and no plaintiff shall recover in any such action if a tender of sufficient amends was made before the action was brought, or if a sufficient sum of money has been paid into Court by the defendant after the action was brought." In other words, the literal meaning of the section appears to be, that any prosecution or action against any person for doing anything contrary to that Act shall be laid and tried in the County where the act complained of was done, and must be commenced within six months; and in any such action the defendant might plead the general issue, and give that Act and the special matter in evidence at the trial, and no plaintiff should recover in such action if tender of sufficient amends had been made before action brought, or if sufficient money were paid into Court by the defendant after action brought. Now why any one prosecuted under the Act should wish to give it in evidence under the general issue does not appear so plain, nor why the Legislature should be so anxious to protect parties who might violate the law which they were enacting, particularly when a sum-

mary mode of recovering penalties under the statute is provided.

It is probable what is meant by the section is, that when any action is brought against any person for anything done or intended to be done under the Act, but in the doing of which the provisions of the statute may or may not have been followed, such person might plead the general issue, give the special matter in evidence, &c., tender amends, and pay money into Court.

The sub-section 2 of that section seems to carry out that idea. It provides : " But no action or prosecution shall be brought against any officer or person, for anything purporting to be done under the authority of this Act, until at least one month after notice in writing of such action or prosecution has been served upon him, or left at his usual place of abode ; in which notice the cause of action, and the Court in which it is to be brought, shall be stated, and the name and place of abode of the attorney endorsed thereon."

I fail to see how this statute can apply in any way to acts done or intended to be done under the provisions of the statute, 27 Vic. ch. 3, the statute of 31 Vic. ch. 40, being the one referred to in the margin of the plea. But if the statute did apply, the cases referred to in the argument seem to shew that when notice of action was required under the provisions of statutes similar in terms to that cited in this case; it was held, the action of replevin being in the nature of a proceeding in rem, the provision as to notice did not apply : *Folger v. Minton*, 10 U. C. R. 426 ; *Manson v. Gurnett*, 2 P. R. 390. In *Gay v. Matthews*, 4 B. & S. 436, Blackburn, J., says : " There is no doubt in the mind of any of us that this is an action of replevin, and that the object of that action is to restore the goods seized, and that neither notice of action nor demand of warrant was necessary." The finding of the jury that the defendants did not honestly believe they had the power to do what they did under the statute, seems also, under the decided cases, to be against the setting up that defence.

This leaves the only remaining question, as to whether the value of the instruments not replevied could be recovered under the declaration in this cause, according to the provisions of our statute. I need not refer to the authorities on this point; they are cited in the judgment delivered by the learned Chief Justice of Appeal, when presiding in this Court, in *Deal v. Potter*, 26 U. C. R. 578. That case decides in effect that when the declaration alleges, as it does in this case, that defendants detained and still detain the goods, &c., the plaintiff may recover damages for the full amount of the goods detained, as well as damages for their detention. In addition to the cases there cited, I have seen references to some American reports as to this action, sustaining the same views as there presented. *Badger v. Phinney*, 15 Mass. 359, is said to shew that replevin will lie when there is an unlawful detention, though there may have been no tortious taking.

The judgment in *Deal v. Potter* seems to me to cover the whole question as to recovering the value of the articles not replevied; and as they exceed \$90 in value, the additional \$10, for damages and the replevin bond, cannot be considered excessive.

I think, therefore, the defendants' rule must be discharged.

MORRISON, J., and WILSON, J., concurred.

*Rule discharged.*

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## STREET v. FOGUL.

13 & 14 Vic. ch. 67.—*Sale for taxes—Occupied land sold as non-resident.*

Under the 13 & 14 Vic. ch. 67, land was sold in 1852, for taxes of several years, including 1851, for which year the collector's roll had been returned to the treasurer, with his affidavit that the reason for not collecting the amount was that the land was non-resident. It was proved clearly, however, that from the 6th February, 1851, until long after the sale, the land had been occupied by defendant's father, who lived upon it with his family.

*Held*, that the sale was illegal.

It was objected also that there was no proof of want of distress on the land, nor of the advertisement of sale: that the affidavit of the collector was insufficient: that the assessment was not proved: that sections 45 and 46 of the Act had not been complied with; and that the sheriff did not sell that part of the lot most beneficial to the owner; but these objections, upon the evidence set out below, were overruled, except the last, which was not decided.

EJECTMENT for 30 acres of the south-east part of lot 23 in the first concession west of Hurontario Street, in the Township of Mulmur. The action was commenced on the 26th April, 1870.

The plaintiff claimed title by deed, dated 24th December, 1855, from the sheriff to him as purchaser at a sale for taxes on the 18th December, 1852.

The defendant, besides denying the plaintiff's title, asserted title in himself by deed from William Fogul to him, dated 11th March, 1867.

The cause was tried at the last Fall Assizes held at Barrie, before Gwynne, J., when a verdict was entered for the plaintiff.

The evidence was to the following effect:—The assistant County treasurer produced the collector's roll of the Township of Mulmur for the year 1851. The whole of lot 23 was charged with £4 5s. 1½d. taxes, which were directed to be collected. The collector's affidavit was attached, that the reason why this amount was not collected was that the land was "non-resident." Mr. Lally, who was the treasurer of the County in 1852, said the roll was brought to him by the collector of the Township, and the affidavit was made by him on the 26th May, 1852, before the treasurer. The treasurer did not send any circular notice as required



by statute, because he did not know who the owner was. This lot was advertised, with others, calling on the party to pay the taxes; it was advertised in the *Gazette* of 12th June, 1852. The treasurer inserted it. He took no means to enquire who the owner of the lot was.

The sheriff said he got the warrant to sell the lands, under which the portion of this lot was sold, from the treasurer on the 30th August, 1852; it was dated the 23rd of that month. This lot was mentioned in the warrant. The arrears of taxes against the lot were stated at £4 5s. 7d.; the warrant was under the hand and seal of the treasurer. He advertised, in a local newspaper, the lands to be sold; could not say what paper; had no copy of it; had no entry of the time of advertisement or of sale; believed he advertised it as required by statute; did not advertise in the *Gazette*; thought a notice of sale was put up on the Court House door, but could not say; he believed he did what the statute required, and that was all he could say. He offered the lot for sale at a public sale held at Barrie on the 18th December, 1852. On that day he sold the 30 acres in question to the plaintiff. He announced, at the opening of the sale that he would sell from the numbering corner, and go to the centre of the concession, wide enough to give the quantity sold. With this lot that would be the south-east corner. The deed of the 30 acres he gave was dated 24th December, 1855. The description in the deed was according to the mode he had announced at the sale; could not say if he sent a bailiff to search if there was a distress on the land; was not in the habit of doing so; made no enquiry which would be the most advantageous part of the lot to sell for the owner; sold according to a general plan he had laid down. The lot was a wild lot; it was impossible to ascertain what part would be most advantageous to the owner to be sold, without surveying every lot. In 1852 did not think a surveyor could have got readily to the lot. The sale book shewed there were hundreds of people present at the sale; had no reason to think the piece sold was disadvantageous to the owner.

For the defence, *Charles Fogul*, a brother of defendant, said: "My father built a house on the lot in 1850, and chopped a little round the house; he went to live there in February, 1851, and took goods and chattels with him. He lived there ever since till about a year ago. He let defendant have the lot about four years ago. There were always goods and chattels on the lot since 1851 sufficient to make £5 or £6."

Other evidence was given, but not altering the case.

The learned Judge found that the [defendant's father came up to the lot, as stated in evidence, in 1851; and a verdict was entered for the plaintiff.

In Michaelmas Term, 1870, *Boys* obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside, and a nonsuit or verdict entered for the defendant, on the leave reserved; or why a new trial should not be had, on the following grounds:—

1. That the plaintiff did not prove there was no distress on the land sufficient to pay the taxes for which the land was sold, while, on the contrary, it was proved that there was sufficient distress on the land to pay the taxes.

2. That the plaintiff did not prove there had been any advertisement of the intended sale, either in the "Canada Gazette" or a local newspaper.

3. That a collector's roll for the township of Mulmur was improperly admitted as evidence on the trial, the affidavit required to be endorsed thereon not being in accordance with the provisions of the Statute.

4. The plaintiff did not prove that the sheriff sold the portion of the lot which was most beneficial to the owner; while, on the contrary, it was proved that the sheriff sold according to an arbitrary rule of his own.

5. That no sufficient evidence was given of the lot having been legally assessed.

6. That there was no evidence of the advertisement required by 16 Vic. ch. 183, sec. 8.

7. That there was no evidence given of the requirements

of the 13 & 14 Vic. ch. 67, secs 45 & 46, having been complied with.

8. That the land being occupied was erroneously assessed as non-resident land, and could not in consequence be legally sold.

In Hilary Term last, *McCarthy* shewed cause. The sale was made under the 13 & 14 Vic. ch. 67, which was in force for only one year. Under that Act it was not necessary to shew there was a distress on the land. The law in that respect had been altered : *McDonell et al. v. McDonald*, 24 U. C. R. 74; *Allan v. Fisher*, 13 C. P. 63. The sheriff was not bound to advertise in the "Gazette," but in a local paper only : 13 & 14 Vic. ch. 67, sec. 50 ; and there was evidence of such a publication, though the paper could not be produced or found. An insufficient advertisement will not avoid a sale : *Jarvis v. Brooke*, 11 U. C. R. 299 ; *Connor v. Douglas*, 15 Grant 456. The treasurer may prove the arrears of taxes by his books : *Hall v. Hill*, 22 U. C. R. 578. The warrant might be sufficient for the purpose. The collector's roll was produced at the trial for that purpose. The roll at that time contained the names of all persons resident and non-resident. The collector having returned the lot as non-resident, it must be considered as a non-resident lot. So long as taxes are in arrear the sale is good : *Allan v. Fisher*, 13 C. P. 63.

Section 53 shews what part of the lot was to be sold. It is said here the part sold was not shewn to have been the most advantageous for the owner. *Lord Rendlesham v. Meux*, 14 Sim. 249. The case of *Knaggs v. Ledyard*, 12 Grant 320, turned on a want of description in the deed of the part sold. *McDonald v. McDonell et al.*, 24 U. C. 424, and *Cayley v. Foster*, 25 U. C. R. 405, are to the same point. Then it is said the land was not legally assessed, but if so, the purchaser was not bound to prove a legal assessment. The sixth ground of the rule was given up by defendant. There is no difference between resident and non-resident land. The 29-30 Vic. ch. 53, sec. 156, cured all the exceptions raised, unless taken within four



years from the passing of that statute. The four years are a bar here. The Ontario Act, 32 Vic. ch. 36, sec. 155, has given two years. The question is, whether these two years are an extension of the previous four years; whether they are to take cases out of the protection of the former act, which had full protection when the later act was passed.

*Boys* supported the rule. The four years under the Act of 1866 had not expired when the suit was brought. That Act was passed in August, 1866, and this action was brought in April, 1870. There is, therefore, no bar. The 13 & 14 Vic. ch. 67, sec. 42, directs how the collector's roll shall be returned, and verified by affidavit. The roll in question was not properly verified, and should not therefore have been received in evidence; besides, it was not proved to have been the true original roll. As to searching for distress he referred to *Doe dem. Bell v. Redumore*, 3 O. S. 243; *Hamilton v. McDonald*, 22 U. C. R. 136. By 27 Vic. ch. 19 sec. 4 the sheriff and collector need no longer search for a distress on the land. The secondary evidence given of the advertisement by the sheriff, was not sufficient to establish the fact of an advertisement in a local paper: *Williams v. Taylor*, 13 C. P. 219; *Hall v. Hill*, 22 U. C. R. 578; *Cotter v. Sutherland*, 18 C. P. 407. There was no evidence of any legal assessment having been made of the lot. By the 13 & 14 Vic. ch. 67, secs. 45 and 46, there was no notice sent to the owner of the lot, nor was any advertisement published in the *Gazette*. The return of the land being in arrear should have been made to the county council, and the county council should have made a return to the local municipalities. The land was in actual occupation by the defendant's father and family, who had his cattle, stock, and other property upon it in February, 1851, long before the roll was returned which described the lot untruly as non-resident land, and gave that as the reason why the taxes for that year could not be made. The sale is therefore defective.



WILSON, J.—The Act of 1850 did not require any search to be made for goods and chattels on non-resident lands to distrain upon for the arrears of taxes before making a sale of the land. The 34th section applies to the case of residents after a demand had been made on them for payment of the taxes by the collector. It does not apply to the sheriff at all.

The first objection fails; the second also, for there was evidence of the advertisement having been duly made and published.

The third objection also is not sufficient to exclude the roll. The affidavit excepted to is quite a sufficient compliance with the statute.

Sufficient *primâ facie* evidence was given to sustain the case against the fifth objection.

The sixth objection was not taken at the trial, and has not been insisted on, but withdrawn.

The seventh objection, so far as the publication by the treasurer in the *Gazette*, calling on parties to pay the arrears of taxes, was proved according to the 45th section. The provisions of the 46th section were *primâ facie* proved to have been complied with.

The eighth objection, that the land being occupied was erroneously assessed as non-resident land, and could not, in consequence, be legally sold, is a more serious one.

The Act of 1850 does not apparently authorize any but *non-resident* land to be sold for taxes: sec. 48.

Non-resident land was defined to be "unoccupied lands not known to be owned by any party resident or having a legal domicile in the township, &c., where the same are situate, or belonging to any party whose residence or domicile, upon diligent enquiry by any assessor of such township, &c., shall not be found therein": section 8.

The land must therefore have been unoccupied to constitute it non-resident land; see also sections 20 and 42.

The finding here is that the defendant's father came up to the lot as stated in evidence, in 1851; that is, he went to the land on the 6th of February, 1851, and lived there

ever since till about a year ago. He had built a barn on it in 1850, and moved up to it with his family, and goods and stock in February, 1851.

The lot from February, 1851, was not therefore *unoccupied* land, and the taxes for which the sale was made included those for that year.

The sale could not therefore have been legally made of that land, nor for that year's taxes.

The fact that it was assessed as non-resident land while it was not so, will not make it non-resident land.

The fact that the land was sold for non-payment of taxes, when they were always duly paid, will not justify a sale as for non-payment.

The 42nd section enacts, that the account returned by the collector under oath of the arrears, and of the causes of such arrears being unpaid, "shall be sufficient authority to the County treasurer to proceed to sell the lands on which such taxes remain unpaid."

That cannot mean that anything which the collector returns shall be incontrovertible, for that would be to make the collector the master of every non-resident lot in his township. It means only that the treasurer shall be justified if he act upon the return so made to him; the collector's return shall be deemed to be *primâ facie* correct.

It is not necessary, therefore, to say what effect the sheriff's sale had, or should have, when he acted on a rule of his own, without regard to the interest of the owner, as the statute directed he should have done; and when it was shewn that the sale so made was not in fact disadvantageous to the owner, and it was not pretended that it was so.

The case is decided on the other point: that by the Act of 1850 it was only unoccupied or non-resident land which could have been sold, and this land was proved and found to have been occupied before the assessment of 1851 could have been made, and for which year jointly in one sum with other years' arrears the sale was made. Such a union of the bad with the good years' arrears will not, we think, support the sale—not under our own decisions on this point.

I think the rule should be made absolute to enter a verdict for the defendant.

MORRISON, J., concurred.

DRAPER, C. J. OF APPEAL, not having been present at the argument, took no part in the judgment.

*Rule absolute.*

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### LANG v. MATTHEWMAN.

#### *Description of land—Boundaries.*

J. L. conveyed to G. L. a piece of land extending 103 feet 6 inches along the south side of Wellington street, easterly, from its intersection with Elgin Street, covenanting that should the line of Wellington street be shifted to the north, he would grant to G. L. any land thus left intervening between that street so changed and the land now granted. The south side of Wellington street was shifted about 23 feet to the north, and as Elgin street intersected it at an acute angle, the intersection was about 11 feet further west than before. G. L. having obtained a conveyance in accordance with the covenant:

*Held*, that he was entitled to have his eastern boundary produced on its original course, at right angles to Wellington street, though he would thus have more than 103 feet 6 inches on that street; for the intention was to give him all the land in front of that first conveyed to him, and between it and the street as altered.

THIS was an action of ejectment brought to recover a piece of land on the south side of Wellington street in the city of Ottawa. A case was stated for the opinion of the Court, of which the material facts sufficiently appear in the judgment, the question being one of boundary, turning upon the construction of certain deeds.

The following sketch will serve to shew the position of the land:—





necessary to be mentioned, being its northern one, being 138 feet on the south side of Wellington street, easterly from its then intersection with Elgin street. That deed contained a covenant by Sparks, "that if at any time the then line of Wellington street should be changed or altered, whereby a piece or space of land should intervene between the northern boundary of said land thereby granted or intended to be granted, and the south side of Wellington street aforesaid, as it should stand after such change or alteration as aforesaid, if any such change should happen, that then and in such case he, the said Sparks, his heirs, &c., should grant, &c., to said John Lang, his heirs and assigns, in fee simple, such piece or space of land so intervening, whatever the same should be, &c."

By deed dated the 11th August, 1858, John Lang conveyed to George Lang, a portion of the land, irregular in shape, its northern boundary being 103 feet 6 inches, on the south side of Wellington street, commencing at the then intersection of Elgin and Wellington streets, and running easterly that distance, which deed contained a like covenant to the one set out in Sparks's deed.

On the 27th January afterwards, George Lang conveyed to the defendant the same land, and also all his interest under the covenant referred to.

Between the date of this last deed and the deeds herein-after referred to, the south side of Wellington street was shifted to the north about 23 feet, and as Elgin street intersected the south side of Wellington street at an acute angle, the new intersection of these two streets on the south side of the latter, takes place at a point further west, about 11 feet; Wellington street being necessarily that far extended, owing to Elgin street not running on a course at right angles to it.

By deed dated the 2nd August, 1869, the heirs of Sparks, after reciting the deeds above mentioned, and the alteration of Wellington street, whereby a piece of land intervened between the northern boundary of the land granted by Sparks to John Lang, &c., conveyed to defendant all

that portion of land which intervened or lay between the northern boundary of the land conveyed by John Lang to George Lang, and by the latter to defendant, and the south side of Wellington street, as it now stands.

And by deed bearing even date with this last deed, and with similar recitals, Sparks's heirs conveyed to John Lang the land lying between the northern boundary of the land first above conveyed by Sparks to John Lang, and the south side of Wellington street as it now stands, excepting, however, thereout the portion conveyed by the previous deed to the defendant.

And by deed, dated 2nd February, 1871, John Lang conveyed to the plaintiff a portion of the land, described as commencing on the south side of Wellington street, at the distance of 103 feet 6 inches from the south east corner of Wellington and Elgin streets; thence southerly, parallel to Elgin street, to the north-east corner of land conveyed by George Lang to defendant; thence southerly along the rear boundary of defendant's land, &c.

This point of commencement, it will be noticed, is at the same distance from the new intersection of Wellington and Elgin streets, as defendant's land was described as running from the intersection of these two streets, as Wellington street originally stood; the result being, that if the eastern boundary of defendant's land cannot be projected under his deed from the heirs of Sparks, of the 2nd August, 1869, on its course (which was one perpendicular to or at right angles to Wellington street), across the land lying between the old and new lines of Wellington street, but, as the plaintiff contends, it should be on a line to a point 103 feet 6 inches from the new intersection of those streets, then a triangular piece of land of about 10 feet base on Wellington street, and 23 feet perpendicular, and embraced between the disputed lines, and which is the land in question, would belong to the plaintiff.

The defendant claims that under the deed from the heirs of Sparks, his present eastern boundary is formed by a line drawn from the extremity of his former eastern limit,

across the intermediate space of land referred to, on the original course of his eastern limit, and perpendicular to Wellington street. The plaintiff claims, on the other hand, that it is formed by a line drawn on a course parallel to Elgin street, and terminating at the distance of 103 feet 6 inches from the new intersection of Elgin and Wellington streets; and the question is, whether the contention of the plaintiff ought to prevail.

We think not. Taking the description set out in the different deeds, and looking at the very clear plan furnished with the special case, it appears that the eastern boundary of the defendant's land terminated on the original south side of Wellington street, striking it in a course at right angles to the street. By applying the scale to the plan, it was on a course about N. 32° W., while the western boundary, being limited to Elgin street, was about N. 51° W., so that the eastern and western boundaries were not parallel; and it seems clear to me that what was intended by the covenant in the original deed from Sparks, and by the deed from his heirs to the defendant, was to convey to defendant the piece of land lying and situate between the former south side of Wellington street, which was the original northern boundary of both plaintiff's and defendant's lands, and the present south side of that street, and that the defendant's deed embraces the land between those limits, bounded on the east by the extension of his eastern boundary line in its course to the present south side of Wellington street.

The case cited by Mr. Harrison of *Crooks v. The Corporation of Seaford*, L. R. 6 Ch. App. 551, is an authority for that construction.

If the plaintiff's contention was to prevail—viz., that the defendant's line should be drawn from the former extremity of his eastern boundary to Wellington street, not at right angles to it, but at an obtuse angle—as remarked by Lord Hatherley in the case cited, it would be giving the plaintiff land in front of defendant's; and if the defendant has built according to the former limit of Wellington street,



would partly cut off his buildings from that street, which would be unreasonable, and never could have been intended, for the words of the deed of the 2nd August, 1869, expressly convey to defendant the land lying between the northern boundary of the land described in the deed from John Lang to George Lang, and the now south side of Wellington street: in other words, the land lying in front of defendant's land. Such northern boundary is not disputed; but the plaintiff desires to cut off some of the land opposite the eastern limit of that boundary, upon the ground, apparently, that defendant, by the shifting of Wellington street, has gained an advantage opposite his western boundary on Elgin street.

By construing the deeds of the heirs of Sparks to the plaintiff and defendant as conveying to them respectively the land lying opposite their respective lands, divided and bounded by a line drawn perpendicular to Wellington street, that is, an extension of the plaintiff's western limit and defendant's eastern one, the plaintiff gets all the land it was intended he should have, and that he is properly entitled to; and as the defendant claims and defends for land within that limit, he is entitled to our judgment in his favor.

*Judgment for defendant.*

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IN RE THE ELECTION FOR THE TOWN OF BROCKVILLE AND  
TOWNSHIP OF ELIZABETHTOWN.

*Controverted Election—Corrupt Practices—“Illegal and Prohibited Acts in reference to Elections”—Selling and giving Liquor—Carriage of Voters—Right to reserve questions of law—32 Vic., ch. 21, 34 Vic., ch. 3.*

Upon questions reserved by the rota Judge under “The controverted Elections Act of 1871,” it appeared that H. and B. voted for Respondent. H. kept a saloon, which was closed on the polling day, but upstairs, in his private residence, he gave beer and whiskey without charge to several of his friends, among whom were friends of both candidates. B., who had no license to sell liquor, sold it at a place near one of the polls to all persons indifferently. This was not done by H. or B. in the interest of either candidate, or to influence the election, B. acting simply for the purpose of gain; and the candidate did not know of or sanction their proceedings.

*Held*, (though with some doubt as to B.) that neither H. nor B. had committed any corrupt practice within sec. 47 of 34 Vic., ch. 3, and therefore had not forfeited their votes; for they had not been guilty of bribery or undue influence, and their acts, if illegal and prohibited, were not done “in reference to” the election, which, under sec. 47 of 34 Vic., ch. 3, is requisite in order to avoid a vote.

The words “illegal and prohibited acts in reference to Elections,” used in sec. 3, mean such acts done in connection with, or to affect, or in reference to elections; not all acts which are illegal and prohibited under the election law.

The right to vote is not to be taken away or the vote forfeited by the act of the voter unless under a plain and express enactment, for it is a matter in which others beside the voter are interested.

One M., a carter, who voted for Respondent, at the request of P., the Respondent's agent, carried a voter five or six miles to the polling place, saying that he would do so without charge. Some days after the election, P. gave M. \$2, intending it as compensation for such carriage, but M. thought it was in payment for work which he had done for P. as a carter. The candidate knew nothing of the matter.

*Held*, that there was properly no payment by P. to M. for any purpose, the money being given for one purpose and received for another; but that if there had been it was made after P.'s agency had ceased, and there was no previous hiring or promise to pay, to which it could relate back.

If such payment had been established as a corrupt practice, it would have avoided P.'s vote, but not M.'s; and it would not have defeated the election, for it was not found to have been committed with the knowledge or consent of the candidate, but the contrary.

*Quære*, whether, under 34 Vic., ch. 3, sec. 20, the Judge has power, before the close of the case, to reserve questions for the court.

THIS was a case stated under the Controverted Elections Act of 1871, as follows:—

## CASE.

## IN THE QUEEN'S BENCH.

*Controverted Elections Act of 1871.*

Election for the Town of Brockville, with the Township of Elizabethtown thereto attached, holden on the fourteenth and twenty-first days of March, A. D. 1871.

Court for the trial of an Election Petition for the Town of Brockville, with the Township of Elizabethtown thereto attached, between Samuel Flint, *Petitioner*, and William Fitzsimmons, *Respondent*.

At the above Court, holden on the 26th, 27th, 28th, 29th, and 30th days of June, and on the 5th and 6th days of July, A.D. 1871, before me, the Honorable John Hawkins Hagarty, Chief Justice of the Court of Common Pleas, and one of the Judges on the rota for the trial of Election Petitions, the above named petitioner charged by his petition that the said respondent was not duly elected or returned, and that the said election was void, by reason that the said respondent and his agents, with a view of promoting the election of the said respondent, caused certain hotels, taverns, and shops, in which spirituous or fermented liquor or drinks were, at the time of the said election, ordinarily sold, to be opened and kept open on the day of polling votes at said election, in the wards and municipalities in which said polls were held, and caused spirituous and fermented liquors and drinks to be sold and given to divers persons within the limits of the said town of Brockville and the township of Elizabethtown during the day of polling votes at the said election; and hired certain horses and vehicles, and promised to pay for certain other horses and vehicles, and did pay for the same, to convey voters to or near or from the polls or polling places, or the neighbourhood thereof, at the said election; and also by reason that divers persons who were guilty of the above practices voted at the said election for the said respondent. And the said petitioner by the said petition prayed the said seat, or a scrutiny, and that on such scrutiny the votes

of the said persons who were guilty of the above corrupt practices should be struck off the poll.

Upon consideration of the evidence adduced on behalf of the petitioner as to the said charges, I find as follows :—

1. As to George Houston. I find that George Houston, one of respondent's voters, was a saloon-keeper in Brockville : that on the polling day his saloon was closed and locked : that up stairs, in a room in his private residence, he had beer and whiskey on a table : that many of his friends, perhaps to the number of twenty to thirty, were that day, at different times, up in this room, and had liquor : that no pay was taken or expected, nor any charge made for this ; he told any of his friends who were in the habit of coming to his saloon that they could have a drink up stairs : that friends of both candidates were there on his invitation, and some not voters : that he was under the impression that so giving this liquor was not violating the law : that this was not done to influence any vote or voter by means of liquor : that it was not done in the interest of either candidate, nor to produce any effect in the election or its result ; and that the respondent did not know of or sanction these proceedings.

2. As to Samuel Burns. I find that Samuel Burns had no license to sell liquors : that he voted for respondent : that he sold liquor to all persons that asked and paid for it on the polling day at a place near one of the polls in the township : that he sold to persons, voters and others, without reference to their side or politics : that this was not done in the interest of either candidate, or to affect the election or its result, but simply for the sake of gain ; and that the respondent did not know of or sanction these proceedings.

3. As to the charge of conveying voters to poll. I find that William McKay, a carter in Brockville, and a voter for respondent, did, at the request of Thomas Price, an agent of respondent, carry an old man named Paul, a voter for respondent, a distance of five or six miles to the polling place : that McKay was aware on the polling day that it



was illegal to carry voters for hire, and had expressed his willingness to carry voluntarily and free of charge, being anxious to help the respondent: that when Paul was spoken of, Price asked McKay could he, McKay, not carry him to the poll, and McKay said he would do so without charge, and that no hiring or payment was then contemplated between them: that some days after the election Price gave McKay \$2, considering that McKay was a poor man, and that he ought to give him something, and paid him the money intending it as a compensation for so carrying the voter: that McKay did not receive it as such, but received it thinking it was in payment for some work he had done for Price as a carter in his ordinary business, and that there was an account between them for work in or about the amount of that sum: that when the \$2 were paid, nothing was said about carrying the voter; that the respondent knew nothing of this matter, and never authorized or sanctioned it.

The opinion of the Court of Queen's Bench is requested:

1st. What is the legal effect of the payment by Price, an agent for respondent, to McKay, as found by me: whether it was a "corrupt practice," and, if so, did it avoid the vote of Price or McKay, or of both, as voters for respondent, or does it avoid the respondent's election?

2nd. Whether the giving or selling of liquors, as found by me, in such cases as Houston or Burns, avoided the votes of the said persons, or either of them?

(Signed) JOHN H. HAGARTY, C. J., C. P.

In this Term, *Bethune* appeared for the petitioner. The question as to the votes of Houston and Burns, arises under the Ontario Act 32 Vic., ch. 21, sec. 66, which requires all hotels, taverns, and shops in which liquors are ordinarily sold, to be closed during the polling day, and forbids any liquor to be sold or given to any person within the municipality during such period, under a penalty of \$100. The amending Act, 34 Vic., ch. 3, had two objects—to change the mode of trial, and more effectually to prevent corrupt



practices at elections. In it, by sec. 3, a definition of corrupt practices is for the first time given, and it could hardly have been more comprehensive. It includes all "illegal and prohibited acts in reference to elections, or any of such offences, as defined by Act of the Legislature." The acts of both of them were clearly prohibited, and contrary to the statute, and were therefore corrupt practices: 1 *O'Malley* and *Hardcastle*, 134. Their votes are both bad, therefore, under sec. 47 of 34 Vic., which declares that any corrupt practice committed by an elector voting at an election shall avoid his vote. There is no clause expressly against "treating," as in the English Act, where it is provided for specially. Secs. 61 and 66 of our Act, 32 Vic., ch. 21, provide against it in effect, and are very stringent, making no exceptions even for medical purposes, though perhaps that might be implied. No question as to intention can arise under sec. 66, as under secs. 61, 63, 67, nor as to agency, as under sec. 71.

As to Price's conduct, the 34 Vic., ch. 3, sec. 47, avoids his vote. His act was one of agency on behalf of the respondent. The intent of the agent is of no consequence; and the principal is affected by his act, although the agent was not employed for the purpose in which he violated the Act: 1 *O'Malley* and *Hardcastle*, 107, 184, 201. His act was an offence against sec. 71. The payment he made after the election was intended as compensation for carrying the voter, and although the agency had terminated, yet such payment, being connected with the precedent act of the agent, related back to the time when the service was performed, by analogy to the doctrine of ratification: 1 *O'Malley* and *Hardcastle*, 261.

The statute, under the Interpretation Act, 31 Vic., ch. 1, sec. 7, sub-sec. 39, should be liberally construed, so as best to ensure the attainment of its object. Votes are given on certain conditions, which must be observed. [WILSON, J.—Is that so? Is it not rather a right, of which these provisions are merely safeguards?] If a prohibited act be done by a candidate, it avoids the election; if it be

done by a voter, it avoids his vote ; if done by another, it subjects the person to a penalty.

*J. H. Cameron, Q.C., contra.* It is not pretended the election can be avoided excepting by reason of the payment by Price. As to the matters relating to Houston and Burns : the acts prohibited by sec. 66, before referred to, are not necessarily connected with elections at all. Hotels, &c., are required to be closed during the polling day, and no liquor is to be sold or given that day under a penalty. The election may be over early in the day ; but at whatever hour the poll is closed, the hotels, &c., must be kept closed the whole of that day, from the earliest hour in the morning till midnight. The illegal or prohibited act, to be a "corrupt practice," and to avoid a vote, must be an illegal or prohibited act "in reference to elections," which these acts were not. The heading of "Prevention of Corrupt Practices at Elections," before sec. 67, cannot be held to govern all the sections down to sec. 74 ; for sec. 72 defines what shall be deemed to be "undue influence." There is no necessity to hold any act to be a *corrupt practice* unless it be expressly declared to be so, because all prohibited acts have some penalty or other attached to them. Houston and Burns may be subject to a penalty under sec. 66 ; but their votes are good, and cannot be disallowed.

As to Price's case : Agency, if established at the time he employed the team, must be shewn to have continued up to the time when he paid the money. There was no proof of hiring under 32 Vic., ch., 21, sec. 71 ; and the act of payment was a voluntary act of Price after the election was over, made not on account of the service rendered, but from charity, and not for the candidate, but for himself, and in his business. There was no agency existing then. A *payment* must be the act and intent of both ; such intent was absent from the minds of both, but if absent from the mind of one, that is sufficient to make it no payment. Price's act, if within sec. 71, merely destroys his vote, and subjects him to a penalty ; it does not defeat the election.

Nothing will avoid the election unless, under the 46th sec. of 34 Vic. ch. 3, a corrupt practice be reported by the Judge to have been committed by or with the knowledge and consent of the candidate. An election committee has much greater power in this respect under ch. 21, sec. 69. The argument may be thus shortly restated :—1. Price was not an agent at the time of the payment. 2. If he were, the payment was not with the knowledge and consent of the candidate. The election, therefore, cannot be avoided. 3. Price did not *hire* any team ; his vote, therefore, cannot be struck off. Houston's and Burns's votes are good ; at most their acts were prohibited, and they may be subject to a penalty. Where the Legislature have declared that a vote shall be lost for a particular cause, it does not intend that it shall be forfeited for any other cause.

*Bethune*, in reply. Selling or giving liquor does avoid the votes. As to what is undue influence, see *Huguenin v. Baseley*, 14 Ves., 272, and in 2 *White and Tudor*, L. C. 504, 3rd ed. It differs in its nature from an illegal or prohibited act. If the 47th section is not more extensive than the law was before, it is of no value.

*Entertainment*, it is not said shall avoid the election ; but it does so because it is a prohibited act. The 43rd section of the Imperial Act, is the one which has not been adopted in our Act. As to Price's act, it avoids the whole election ; but at any rate his vote is avoided by the 71st section. Most of the payments in such cases are made after the election. He referred to the cases already decided under this act : The *Glengarry Case*, before Hagarty, C. J. ; *North York Case*, before Galt, J. ; *Simcoe Case*, before Strong, V.C., and the *South Grey Case*, before Mowat, V.C. (a)

WILSON, J.—The particular cases referred to us by the learned Chief Justice of the Common Pleas, are—1stly, that of George Houston. He voted for Respondent ; was a saloon keeper in Brockville. On the polling day his saloon was closed and locked. Upstairs, in a room in his

(a) The South Grey case is reported in 8 C. L. J. N. S. 17. The other cases above cited are not reported. See also The East Toronto Election, 8 C. L. J. N. S. 115.

private residence, he had beer and whisky on a table. He gave it to those who came without pay or expectation of it. It was not done in the interest of either candidate, nor to influence any vote or voter, nor to produce any effect on the election; nor did the Respondent know of or sanction it.

2ndly. That of Samuel Burns. He had no license to sell liquors. He voted for Respondent. He sold liquor on the polling day, near a poll in one of the townships, and charged for it. He sold it to persons without reference to their side or politics. In other respects, his case is similar to that of Houston.

These two cases may, therefore, be considered together.

The part of the 32 Vic., ch. 21, sec. 66, which applies to these cases, is the latter part of it: "And no spirituous or fermented liquors or drinks shall be sold or given to any person within the limits of such municipality during the said period," (*i. e.* during the day appointed for polling,) "under a penalty of \$100 in every such case."

And it was argued that because they had infringed the provisions of this section, the one by *giving* and the other by *selling* liquor, they had not only incurred a penalty, but had forfeited their votes: that such giving and selling were prohibited acts, and were within the provisions as to corrupt practices.

The deprivation of the right to vote, or the forfeiture of a vote already given, is not to be imposed as a penalty upon any one, unless under the express enactment of the legislature. There are other persons interested in and affected by that vote beside the voter. The candidate for whom he has voted is interested in it, and so are the whole body of electors who have voted for the same candidate. One vote has and may again influence or change the result of an election, and that is not to be brought about by merely inferential or argumentative legislation, or as to what the Legislature must have intended. There must be a plain enactment declaring that the vote shall be rejected if tendered, or shall be struck off if given, to justify the disal-



lowance of it, and, as a consequence, to double the penalty on the voter, and so seriously to affect the rights, privileges and interests of others dependent on the vote.

What then has the Statute said on this point?

32 Vic., ch. 21, sec. 70, declares, that on its being proved before any election committee that any elector voting was *bribed*, his vote shall be null and void.

What *bribery* is under that Act, is explained by sections 67 and 68; the acts stated are not acts of bribery; the first of these sections has the caption of "Prevention of Corrupt Practices at Elections."

The 34 Vic., ch. 3, sec. 3, declares that "'corrupt practices' or 'corrupt practice,' shall mean bribery and undue influence, and illegal and prohibited acts in reference to elections, or any of such offences, as defined by Act of the Legislature."

The 47th section enacts that, "If on the trial of any election petition, it is proved that any corrupt practice has been committed by any elector voting at the election, his vote shall be null and void." It is under this section that the votes of Houston and Burns are said to be void. It is said they have each been guilty of a *corrupt practice*, not by reason of having committed bribery, but by reason of their having exercised undue influence, or from their having done illegal and prohibited acts, in consequence of the one having given liquor, and the other having sold it on the polling day.

It is quite plain that undue influence and illegal and prohibited acts in reference to elections must be corrupt practices, when the legislature has declared they shall be so.

Firstly. Were the giving and selling of liquor acts of *undue influence*? The meaning of that term is explained and defined by the 32 Vic., ch. 21, sec. 72, and it is quite manifest that the acts charged against Houston and Burns are not within that category.

Secondly. Were the giving and selling of liquor, as before stated, "illegal and prohibited acts in reference to elections?"

It is necessary to settle what the meaning is of "illegal and prohibited acts in relation to elections." Does the expression mean generally all illegal and prohibited acts *under the election law*; or does it mean illegal and prohibited acts when and because they are done in connection with, or to affect, or in reference to, elections?

In the one case, giving and selling liquor, however disconnected with the election they may be, will, if done within the municipality during the election, be illegal and prohibited acts, and as a consequence will be corrupt practices.

In the other case, such acts will not constitute corrupt practices, unless they are shewn to have been done to influence or to affect the election, or in some way to have been done in connection with it.

The section in which the illegal and prohibited acts in relation to elections are named, contains the election law offences of bribery and undue influence, both of which acts have and must necessarily have a direct and inseparable relation to the actual electoral contest, and to the proceedings anterior to it. Bribery and undue influence in general are not prohibited, but bribery and undue influence in relation to elections only. Why then should any greater effect be given to the other words of the section, "and all illegal and prohibited acts," and more especially as the words "in reference to elections," have been superadded?

It will be found also that the offences of entertaining electors, furnishing colours or badges, and carrying or wearing them, relate in like manner to the elections.

The election law morality is very different from what morality is under the general law. The election law does not prohibit stealing, but it does prohibit the wearing of a party badge within the electoral division on the day of election or polling, or within eight days before such day, or during the continuance of the election. The thief may have on his person at the time he votes the watch of the returning officer, or of the candidate whom he supports, but he is an innocent man by the election law, and a good

voter ; while the elector who has worn a party badge but for five minutes anywhere in the electoral division, miles away from the polling place, within eight days before the election, is a criminal by the election law, and an illegal voter, although in fact a very honest respectable man. The vote of the one, though not his person, will stand the strictest scrutiny. The vote of the other must fail. The thief has been guilty of no corrupt practice, but the wearer of the badge has. This cannot then be a law to *be enforced, unless the enactment* be a plain and positive one.

I do not think we should call every illegal and prohibited act by this special statute, which is intended to operate for a limited time, on a peculiar occasion, and for a particular purpose, a *corrupt practice*, against the provisions of that law, unless the act be shewn to have been done in some way or other with a view to the election, or to bear upon it, or as connected with it, or in relation to it, or as calculated or intended so to operate. If any other construction be given to the statute, it will be attended with very oppressive and needless consequences of punishment and forfeiture.

A general state of drinking and drunkenness at the time of the election among the electors and inhabitants of the locality, resulting from the dispensation of liquor, might well be deemed to be a dispensation of such liquor in relation to the election, although it were made without any special reference to the election. The state of mind, the influence and general condition of things it would induce, would tend naturally to disorder the proceedings, and to cause an untrue and improper expression to be given of the sober popular will. That was the case in *1 O'Malley and Hardcastle*, 85.

But the giving or selling of liquor in consequence of a horse trade, or in payment of an old bet, or from mere friendship, or to test the quality of it as a medicine, or to be shipped abroad, or for any other purpose not "in reference to the election," would not, in my opinion, be an illegal or prohibited act, so as to be a corrupt practice

within the meaning of the statute. Nor do I think the giving or selling of liquor, though on the polling day, but after the poll was closed, and miles away from where the poll was held, would necessarily be an illegal and prohibited act in reference to the election, so as to amount to a corrupt practice: *Coventry Election Petition*, 20 L. T. N. S. 405.

The 61st section of the 32 Vic., ch. 21, permits the candidate and others acting for him, even with intent to promote his election, to furnish entertainment to the electors, so long as it is done at the usual place of residence of the candidate, or of those who furnish it for him. Such *entertainment*, it would be difficult to say, should not include even a single glass of wine.

The statutes contain many illegal and prohibitory acts besides the giving and selling of liquor on the day of the poll, and to hold them to be corrupt practices, although *not* done in reference to the election, would be hurtful to all parties, and utterly unreasonable.

By 32 Vic., ch. 21, sec. 57, sub-sec. 3, any person disturbing the peace and good order may be imprisoned by the Returning Officer or his deputy, for a time not later than the final closing of the poll. Is the vote of that person to be rejected, or afterwards struck off, although his act had no reference to the election, but was occasioned by some great wrong done or provocation given to him?

By sec. 60 every person convicted of a battery committed during any part of the election or polling day, within two miles of the place of election or poll, is to forfeit \$50. Is that person also to forfeit his vote, although the battery had nothing whatever to do with the election, or happened after the election was over?

It appears to me these cases plainly answer themselves, and enable the matter with respect to the giving and selling of liquor to be as easily answered.

The penalties are already quite severe enough, without increasing them against the voter, and extending them to the candidate, and to the other electors of the constituency,



who suffer as well as the voter by the disallowance of his vote, unless we are obliged by the most explicit enactment of the law to do so.

In my opinion, on the case stated with respect to these persons, we are not required, and would not be justified, in avoiding their votes.

The facts shew that the giving and selling of the liquor were not acts done in reference to the election.

On this point, I may however say that I am more satisfied with my conclusion as to the act of Houston, as to the giving of the liquor, than I am with respect to Burns, who sold the liquor in a place and under circumstances giving rise to some degree of suspicion.

The other part of the case relates to the act of Price.

His conduct is complained of on the ground of its having been an illegal and prohibited act in reference to the election, contrary to the 32 Vic., ch. 21, sec. 71. That section declares, so far as is applicable here, "that the hiring or promising to pay, or paying for, any horse," &c., "by any candidate, or by any person on his behalf," to convey voters at any election, shall be an illegal act, and the person offending shall incur a penalty of \$100; and any elector who shall hire any horse, &c., for any candidate, or for any agent of a candidate, for the purpose of conveying electors, &c., "*shall ipso facto* be disqualified from voting at such election, and for every such offence shall incur a penalty of \$100."

The section, it will be observed, is in two parts. The first part affects the candidate and his agent, by subjecting them to a penalty. The second part affects the electors, and beside subjecting them to a penalty it disqualifies them from voting.

Price was an agent of the candidate, and so, as to the penalty, is within the operation of the first branch; but he was also an elector, and so he is within the operation of the second branch, as to the loss of his right to vote.

The case finds there was no hiring of McKay to carry Paul, the voter. McKay carried Paul at Price's request,

but he carried him "voluntarily and free of charge." Some days after the election, Price, as compensation to McKay, gave him \$2 for carrying the voter. McKay did not receive it as compensation, but in payment of work he had done for Price in his ordinary business as a carter.

I do not see how McKay can be within the operation of the section at all. The hiring, or promising to pay, or paying for any horse, &c., applies to the candidate, and to any person on his behalf. That will extend to Price if he hired, or promised to pay, or paid McKay for any horse, &c.; but it cannot extend to McKay, as he was at most the person hired, promised to be paid, or paid. Nor does the second branch apply to him, for that extends to the electors who hire others, and not to those who are hired.

The case has to be considered, then, with regard to Price alone.

At the time he voted—for I assume he did vote, as I gather so from the first question put in the case, and from the argument of counsel, though the case itself does not say he did,—he was under no disqualification; for he had not hired, promised to pay, or paid McKay, and there was no agreement or understanding to do so, but the contrary; the service was to be, as in fact it was at the time performed by McKay, free of charge.

In my opinion, the agency of Price terminated with the election,—the occasion and the purpose for which he was employed. His subsequent payment was an unauthorized act as to his principal. It can relate back to nothing, for there was no hiring or promise to which it could attach. But as a fact it was not a payment; that must be the act and by the assent of both parties. When Price gave the money for one purpose, and McKay received it on another account, and in respect of a different transaction, that was not a payment for the purpose that Price intended it for, more than it was a payment on the account for which McKay received it. It was properly not a payment to or for either one purpose or the other: *Thomas v. Cross*, 7 Ex. 728.

In no view of the case, as the learned Chief Justice has found that the respondent knew nothing of the matter between Price and McKay, and never authorized or sanctioned it, could it be possible to avoid the election, even if Price's act had been determined to be a corrupt practice. For under the 46th section of the 34 Vic., ch. 3, the learned Chief Justice, to affect the return, would have to find that "the corrupt practice had been committed by or with the knowledge and consent of the candidate," whereas he has distinctly negatived that fact.

I am not quite satisfied, as I stated during the argument, however convenient the practice may be, and however desirable it is that the law should be so, that the rota Judge has power, until he is in a position to grant his certificate, under the 34 Vic., ch. 3, sec. 20—that is, until the close of the case—to reserve a question for the court.

Such question is to be reserved "in like manner as questions are usually reserved by a Judge on a trial at *Nisi Prius*," and no Judge at *Nisi Prius* can stop a case in the middle, and adjourn it until he has some intermediate difficulty cleared out of his way by a reference to the Court. If there be any doubt in this respect, the Act should be amended.

Assuming that the case is regularly before us, I shall answer the questions submitted as follows:—

1. That there was no *payment* made by Price to McKay. If it were a payment, it was made by Price at a time when he was not an agent for the respondent, and with respect to a matter to which it could have no proper relation, for there was no antecedent hiring or promise to pay. The matter was, therefore, not a corrupt practice.

If it had been a corrupt practice, it would have avoided Price's vote, but not McKay's vote, for he was the person hired, if there had been a hiring, and such a person is not deprived of his vote.

This act, if it had been established to have been a corrupt practice, would not have defeated the election, because it has not been found to have been "committed by or with

the knowledge and consent of the candidate ;” on the contrary, the very opposite fact has been found for the candidate.

2. That the giving of liquor, as found by the case, by Houston, does not avoid his vote. I have more doubt as to the selling of liquor by Burns, but I am not so free from doubt as to find against him, on the case submitted.

I am of opinion, therefore, that neither of their votes has been avoided.

MORRISON, J., concurred.

DRAPER, C. J. of Appeal, was not present during the argument, and took no part in the judgment.

# IN RE THE ELECTION FOR THE ELECTORAL DIVISION OF THE COUNTY OF MONCK.

32 Vic. ch. 21, secs. 5, 7—*List of Voters not delivered in time—Wrong List used—Effect of—Amendment of Petition.*

The 32 Vic. ch. 21, sec. 7, and sub-sec. 1, enacts that the clerk of each municipality shall, in each year, make from the assessment rolls a list of the persons entitled to vote therein, and deliver it to the Clerk of the Peace on or before the 15th August. By sub-sec. 3, this period shall be directory only to the clerk, “and the said lists shall be valid and effectual for the purposes of this Act, even though not so completed and delivered by the said period of time”; and by sub-sec. 10, no person shall be admitted to vote unless his name appears on the last list of voters, delivered to the Clerk of the Peace “*at least one month before the date of the writ to hold such election.*”

The writ to hold the election was tested on the 25th February, 1871. The list of voters for one of the townships in the Electoral Division was made up from the assessment roll of 1870, and sworn to on the 13th August; but it was not delivered to the Clerk of the Peace until the 17th March, 1871. The list for 1869 had been delivered on the 19th August of that year.

Per *Richards, C. J.*, and *Morrison, J.*, the list of 1869 was the one which should have been used.

Per *Wilson, J.*, that of 1870 was properly used; for that the month should be construed to mean a month from the 15th August, when the roll should have been, or any earlier day when it may in fact have been, delivered; that the roll, though delivered too late, would not otherwise be “valid and effectual for the purposes of this Act;” and the neglect of the clerk should not be allowed to disfranchise voters.



There were 41 voters on the list of 1869 who were not on that of 1870, but it was not shewn that the vote of any one entitled to vote by either list had been rejected; nor was it shewn or suggested that the use of one roll instead of the other could have in any way affected the result of the election. *Held*, that the election was not avoided.

*Held*, also, that the Judge had power to amend the petition by allowing the insertion of an objection to the roll used.

THE petition stated that the petitioners, John W. Collver and Jacob Misener, voted at the election, which was holden on the 14th and 21st of March, 1871, when Lachlan McCallum and James David Edgar were candidates, and the Returning Officer had returned Mr. McCallum as duly elected.

The petitioners then alleged that Mr. McCallum was guilty of bribery, treating, undue influence, and corrupt practices: that persons were admitted to vote for him who were not entitled to vote at the election: that persons under twenty-one, persons who were not subjects: persons not being at the last revision of the assessment rolls on which the voters' lists were based actually and *bonâ fide* the owners, tenants, or occupants of the real property in respect of which they were entered on the rolls; persons not registered or entered on the then last revised and certified list of voters according to the Election Law of 1868; persons who had previously voted at the election; persons who had been guilty of bribery, and persons who had been bribed; persons who had made bets that Mr. McCallum would be returned, and who were corruptly influenced thereby; persons who had been guilty of corrupt practices within the Controverted Elections Act of 1871, and persons whose names as recorded were not actually given by such persons,—were admitted to vote for Mr. McCallum; and that persons entitled to vote, and who tendered their votes for Mr. Edgar, were refused: that the majority declared for Mr. McCallum was only apparent and colorable, as the votes of divers persons who were not entitled to vote were recorded for him; that the real majority of legal voters polled was in favor of Mr. Edgar, and such majority should be increased by many additional good votes tendered for him and refused.

The petitioners therefore prayed that it might be determined that Mr. McCallum was not duly elected or returned : that his election was void ; and that Mr. Edgar was duly elected and ought to have been returned.

Upon the trial of this petition, the following special case was stated by Galt, J., one of the Judges on the Rota assigned to take the Court for the trial of the said election, for the opinion of this Court.

CASE.

The petition of the above named petitioners was filed in the form in the Schedule A., hereunto annexed. [The material parts of the petition have been sufficiently stated above.]

The Court for the trial of the said election petition was holden at Dunnville, in the County of Monck, on the 22nd day of August, 1871.

On the trial of the said petition, I found and determined that in the Township of Gainsborough, in the said electoral division, there were polled at the said election in all 356 votes, of which 231 were polled for James D. Edgar, one of the candidates, and for the respondent, the other of the candidates, 125, leaving a majority in that township for the said James W. Edgar of 106.

I also found and determined that in the whole of the electoral division there were polled 1857 votes, of which 931 were polled for the respondent, and 926 for the said James D. Edgar, leaving a majority of 5 votes for the respondent over the said James D. Edgar ; and that the said James D. Edgar and the respondent were the only candidates at the said election.

I also found and determined that the Deputy Returning Officers for the divisions of the Township of Gainsborough at the said election were provided with, and had with them at the polls, copies of the voters' lists which had been made up from the assessment roll of the year 1870, and sworn to on the 13th day of August, 1870, but which voters' lists were not filed in the office of the Clerk of the Peace for the County of Lincoln until the 17th day of March, 1871.

I found and determined that the list of voters for the township of Gainsborough, made up and certified for the year 1869, and duly filed in the office of the Clerk of the Peace on the 19th day of August, 1869, was not used by the Deputy Returning Officers at the said election, nor were they provided with copies thereof.

That the writ to hold the said election was tested on the 25th day of February, 1871.

That 37 voters were polled in the Township of Gainsborough, who do not appear on the list of voters for 1869, of which 10 were for the respondent, and 27 for the said James D. Edgar.

That the number of voters on the voters' list made up from the assessment roll of 1870, was 539, and on that made up from the year 1869, was 528.

That on the voters' list of 1870 are the names of 52 persons not on the voters' list for 1869.

That in the list of 1869 there are the names of 41 persons whose names do not appear in the voters' list for 1870.

I find that the objection was made by the Attorney for the respondent at one of the polling sub-divisions for Gainsborough, that the wrong voters' list was being used at the said election, and that notwithstanding his objection, and without any objection on the part of the petitioners, the same list continued to be used. I find also that the assessment roll for the township of Gainsborough was finally revised on the 16th of July, 1870.

I granted leave to amend the petition by inserting an allegation in the words following:—"And your petitioners say further, that the Deputy Returning Officers at the said election, acting at the several polling places in the Township of Gainsborough, in the said electoral division, used at the said election copies of a list of voters for the said Township for the year 1870, which had not been filed in the office of the Clerk of the Peace for the County of Lincoln, according to the statute in such case made and provided, one month before the date of the writ to hold the election, and did not use, and were not provided with, at the said elec-

tion, copies of the list of voters for the Township of Gainsboro, made from the assessment roll for the year 1869, and which list was filed in the office of the Clerk of the Peace aforesaid in 1869.

If this honourable Court shall be of opinion that I have the power to make the amendment, then this amendment is to be considered as having been made at the trial of the said petition, otherwise not.

I submit the following questions to this honourable Court, upon the foregoing case :

1. Was the objection open to the petitioners, without amendment, that the wrong list of voters was used by the Deputy Returning Officers of the said election, upon the said petition as originally filed ?

2. If the objection was not open to the petitioners without amendment, had I the power to make the said amendment ?

3. Is the election void or voidable, and if so, should it be set aside on this ground ?

4. If the election be not set aside, upon the hearing of the scrutiny which of the said two lists of voters is to guide me in determining the qualification of the persons who voted ?

5. Is the objection, with or without amendment, open to the petitioners, when at the election the objection was only taken by the respondent, and the petitioners did not object ?

*Anderson and Bethune* for the Petitioners. The wrong list was used. It should clearly, under the facts stated, have been the list made up from the assessment rolls for 1869. [RICHARDS, C. J.—Assuming that, has any one been deprived of his vote ?] That does not appear, and it is immaterial. The Statute here is mandatory. The 32 Vic., ch. 21, sec. 5, says : “The following persons,” describing the classes of persons, “shall, if duly registered on the last revised and certified list of voters according to the provisions of this Act, be entitled to vote.” Then sec. 7 provides that the Clerk of each municipality shall, after the final revision and correction of the assessment rolls in every year, make a correct alphabetical list of all persons entitled



to vote therein; and shall complete and deliver it to the Clerk of the Peace on or before the 15th of August in each year. By sub-sec. 3, the period within which the lists shall be completed and delivered is declared to be directory only; but sub-sec. 10 enacts that "no person shall be admitted to vote, unless his name appears on the list of voters made, certified and delivered to the Clerk of the Peace at least one month before the date of the writ to hold such election." Here the last list so delivered was the list for 1869. That for 1870 was not delivered until after the date of the writ for the election. There were 41 persons in the list for 1869, not in the list used. These persons were thus disfranchised, and there has been no legal election, such as the Statute provides for. The Court cannot go behind the list, and say what would have happened, had the right list been used. [RICHARDS, C. J.—Suppose there were 9,000 voters, and 8,900 voted for the candidate elected, could the election be avoided for an irregularity as to one voter?] Yes. Any error going to the foundation of the whole election—*e. g.* to the list of the persons who are to exercise the franchise—is fatal. [RICHARDS, C. J.—I think the current of authority and the general practice is against this contention.] *Warren* on Election Committees, 382–384, shews that the rule before such committees is, that some injury must be shewn to have resulted from the irregularity; but when the statute is imperative, as here, it is also held that the committee must obey it. The Consol. Stat. C., ch. 6, sub-sec. 5, contains a provision very similar to the one now in question; and in Vol. XXI of the Journals of the Legislative Assembly, p. 293 (1863), it appears that the committee to try the election for the East Riding of Durham reported, "that in consequence of the lists of voters for 1861 having been used at the polls opened for receiving votes in the Townships of Hope and Cavan, and in the Town of Port Hope, at the last election for the East Riding of the County of Durham, instead of the lists of 1860, the said election is void." The Judge had power to amend the Petition, under sec. 2 of the 34 Vic., ch. 3, and sec. 33.

The Stafford Election Petition, 20 L. Rep. N. S. 237-8, shews that an election petition must be regarded as an ordinary suit.

*McMichael*, contra.—There is no authority for the petitioners' contention upon the facts stated. Admitting the irregularity and that the wrong list was used, it must be shewn that some voter was thereby disfranchised by having his vote refused, or that the result of the election was thereby influenced. This is not pretended here, and the Petition therefore must fail.

MORRISON, J., read the following judgment prepared by

RICHARDS, C. J.—I see no reason to change the opinion I expressed on the argument, that the facts stated do not necessarily imply that the elections must be set aside, because the officer made a mistake in furnishing the voters' list that was last sent in, instead of the one that had been delivered to the Clerk of the Peace a month before the date of the writ to hold the election.

I am now considering this point, assuming that the last list sent in is irregular, and not the one which the statute requires. I think the party desirous of setting aside the election must go much further, and shew that some voter who by that list was entitled to vote had tendered his vote, and that it was rejected, and that there are a sufficient number of such votes to affect the result of the election. Taking an extreme view in favour of the petitioner, he would be bound to shew that there were persons whose names were on the proper list, and who were entitled to vote but did not vote at the election, and that there were a sufficient number of such voters to affect the result, supposing they had all voted for the petitioner. He must shew there are such voters; merely saying there are names on the proper list that are not on the one used proves nothing, for these persons who were named on the proper list may all be dead, or may not reside in the Province, or may be disqualified from voting from other causes.

I think the decided cases go to the extent of holding that the list furnished to the Returning Officer would be held to be good, rather than that the rest of the constituency should have their votes go for naught, and all the trouble and excitement of a new election. It is not necessary to push the matter to that length to give effect to the statutes.

The tenth sub-section of section 7 enacts, "No person shall be admitted to vote, unless his name appears on the last list of voters, made, certified and delivered to the Clerk of the Peace at least one month before the date of the writ to hold such election; and no question of qualification shall be raised at any such election, except to ascertain whether the party tendering his vote is the same party intended to be designated in the alphabetical list as aforesaid."

The qualification then is, as I understand it, that the name of the voter must appear on the last certified list that has been delivered to the Clerk of the Peace a month before the date of the writ of election. The Legislature may have deemed it prudent that the voters' list to be used at the election should have been that which was filed before the writ was issued. It would not then have been made up with reference to the holding of a particular election, but as a part of the general duty performed from year to year by the officer of the municipality, without regard to any particular election. Under such circumstances there would be less chance of frauds being practised, and the lists tampered with, for the purpose of favoring the friends or party to which the officer might belong. I think the provision a wise one, and that it ought to be carried out.

It is true, if we declare the voters' list of 1869 the proper one to have been used for the township of Gainsborough, the proceedings will not all harmonize, for the statute did not contemplate the officer making a mistake. But all the formalities in relation to copies of lists and other proceedings of a similar character, together with the

oath to the voters, are merely for the purpose of preventing persons from voting who are not entitled to vote.

I believe most of the Rota Judges, who have considered the subject, have been of opinion that a vote polled under the following circumstances was good :—a voter's name was on the original list, but on being copied on the list for the polling division in which he lived, was omitted by mistake and put in a wrong division, and he voted in the division in which he lived, though his name was not on the list of voters which was furnished to the Deputy Returning Officer. In that case the Deputy Returning Officer would be justified in rejecting the vote, but the voter having really the right, could not be properly disfranchised by the mistake of the officer in taking his name from the list which constituted the qualification. And here those voters whose names were on the list of 1869, the one which had been delivered a month before the date of the writ for the election, were the persons and no other who were properly admitted to vote at such election.

The portions of the 7th section of the statute which precede the 10th sub-section seems to me to provide for the proper making up a return of the list of voters, and that the list shall be valid, though not returned by the time mentioned, and points out the mode of compelling the officer to make the return when he neglects to do so. But the 10th sub-section declares which shall be the qualifying list: viz.—that one which has been made, certified, *and delivered* to the Clerk of the Peace, the month at least before the date of the writ for holding the election.

I am therefore of opinion, if the scrutiny proceeds, the list of 1869 is the one which shews the duly qualified voters at the said election.

I think the learned Judge had the same power to amend the petition as he would have to amend a declaration or any other proceeding at *Nisi Prius*, in a case being tried before him. It seems to me that we should assimilate all the proceedings under this statute as much as possible to those of an ordinary suit at law.



MORRISON, J., concurred with Richards, C. J.

WILSON, J., (after stating the material facts, as set out in the case).—It appears that McCallum had the majority of five in the whole division.

If the list of 1870 were rightly used, each candidate got his full measure of votes, and the result will not be affected.

If the list of 1869 should have been used, there were then 37 bad votes given, and as Mr. Edgar got the larger number of these votes, the majority against him would be increased.

It is not stated that a single person whose name was on the lists either of 1869 or 1870 offered to vote and was refused the right. It may therefore be assumed that no such case occurred. What difference, therefore, can the use of the one list rather than the other have made?

Suppose, instead of there having been any such small difference between the two lists as 40 or 50, the two lists happened to be precisely alike. Would it be of any consequence to the election that the list of the wrong year was used in place of the list of the right year? Or suppose that no list at all were used, but no one voted or offered to vote who had not the right to vote according to the list if it had been there, is the election to be declared void? What difference can there be between the lists of the two years being exactly alike as to the voters appearing on them, and there being a non-agreement between them to the extent of 41 names, when none of these 41 voted, or claimed the right to vote? None, in my opinion.

The complaint here is not that any wrong has been done, but that some formalities have not been observed, from which no wrong has resulted. And it has not been shewn that any election ever has been, or ought to be, vacated in such a case.

If the list for 1869 had in fact been used, I cannot tell, nor can I assume, that a single one of these 41 voters would have voted at all. Nor can I assume that they

were living, or were in the Province, or continued to be qualified at the time of the election, or that they would have voted if they had been. Nor can I say that any injustice was done to Mr. Edgar, whose agent permitted the list for 1870 to be continued to be used, though Mr. McCallum's agent objected to it.

On that state of facts, the petitioners were not entitled to have an amendment made in August last in their petition presented in the early part of the preceding April, to let in the question as to the lists as a ground of objection to the election.

It is true the petitioners are proceeding on their own right as electors and voters, and not as representing Mr. Edgar, but they say that Mr. Edgar was duly elected, and that he ought to have been returned. In such a case, charges of bribery might be proved against the unsuccessful candidate. In like manner, the petitioners should be prevented from gaining any advantage by any act of the candidate, or from any act which he advisedly abstained from doing, which might be used against himself if he were a petitioner.

The 32 Vic., ch. 21, is no doubt our guide in such a case. The persons entitled to vote, by sec. 5, are all persons of the age of twenty-one, &c., who shall be duly registered or entered on the last revised and certified list of voters according to the provisions of the Act; and by sec. 7 those whose names appear as properly qualified on the assessment roll after the final revision and correction of it in each year.

The clerk of the municipality is to make out a voters' list in each year from the assessment roll, and is to certify by oath or affirmation to its correctness before a justice of the peace, and is to keep it among the records of the municipality. He is also to deliver a duplicate of it, certified as aforesaid, to the Clerk of the Peace of the county on or before the 15th of August in each year.

The period for delivery of the list is expressly made directory only, "and nothing herein contained shall render

null, void, or inoperative, the said lists, in the event of their not being completed and delivered within the period aforesaid, but the said lists shall be valid and effectual for the purposes of this Act, even though not so completed and delivered by the said period of time."

The Judge of the County Court may, on application of the Clerk of the Peace, or of any elector, compel the clerk to make up and deliver the lists, if he have not done so by the 15th of August.

Then follows the clause on which the question chiefly turns: "No person shall be admitted to vote unless his name appears on the last list of voters, made, certified, and delivered to the Clerk of the Peace at least one month before the date of the writ to hold such election."

If the Clerk of the municipality delivered the list of voters, certified and completed, by the 15th of August, and a writ of election issued at any time after that, and before the 15th of the following month, the persons who would be entitled to vote are not those whose names are rated "on the assessment roll for that year," under sec. 7, nor those whose names are "duly registered or entered on the last revised and certified list of voters," under sec. 5, but those whose names are on the list for the preceding year, because, although the list for the later year had been made and certified, and delivered to the Clerk of the Peace, it had not been so delivered "at least one month before the date of the writ of election."

The Clerk of the municipality has until the 15th of August within which to complete and deliver the list, and it may well be that if the list be duly delivered to the Clerk of the Peace by that day, that no one should be admitted to vote upon it unless and until it had been for one month in his office.

I can see no reason for it, excepting that the statute declares it shall be so; for all the information which any one might acquire from that list, could be got equally well from the assessment roll.

In such a case the Clerk of the municipality is not in

fault in any way, and it cannot be said he is doing a wrong to any one by doing all he is bound to do.

But after the 15th of August, when he is in default, I am not disposed to hold that by keeping back his returns to the Clerk of the Peace he can, at his mere pleasure, disfranchise any one from voting who is duly qualified in all other respects to vote. The lists are to be "valid and effectual for the purposes of this Act, even though not so completed and delivered by the said period of time." But how are they to be valid and effectual "for the purposes of this Act" if they are not to be used at all because not *delivered* a month before the writ issued; and of what use is it to declare that they shall be valid "even though not so completed and *delivered* by the said period of time," if they are not to be acted upon *because* they have not been delivered *at least one month* before the date of the writ?

In my opinion the month applies to such a period to be computed from the 15th of August, or any day before it on which the Clerk of the municipality should or may deliver the lists, and not to a time of delivery after that day when the Clerk of the municipality is in default, and chooses capriciously to make the delivery, if at all.

In this case the Clerk made out the voters' list and certified it under oath on the 13th of August, 1870; but it was not filed, the case says—probably it was intended to say it was not delivered, for there is nothing about *filing* in the statute—until the 17th of March, 1871, before the election was over, and which list was valid and effectual for the purposes of the Act, even though it were not completed and delivered before the 15th of August. Suppose the Clerk of a municipality not to make out or not to deliver the list for several years in succession, could an election be held in that municipality; and if so which list should be acted on, the one last delivered a month before the writ of election issued, or the one for the proper year, although informally delivered? If the one last delivered a month before the writ be the one to be acted on, then a body of



electors greatly differing from the proper body of electors may be those who are returning the Member of Parliament.

Or suppose, what may easily happen, that the Clerk of a township established within the last three or four years has never delivered a voters' list at all. Is that township to be deprived of voting, or is a list to be delivered for the occasion. If so, what other list can be acted on than the one for the last year?

It may be said the list is still valid and effectual for the purposes of the Act, though it be completed and delivered after that day, and though it is not to be voted upon until the Clerk of the Peace has had it for at least one month from the actual delivery of it to him.

That it may be voted upon at any election which is held under a writ that is dated a month after the delivery of the list is true, and no harm is done so long as it is really the last revised list which is and should be acted on. But it does not cure the wrong which must be done if the law be as has been contended by the petitioners, in case the Clerk have not delivered the list by the 15th of August, and the writ of election should issue before the list has been in the possession of the Clerk of the Peace for one month.

In that case the Clerks of municipalities become virtually the arbiters of parliamentary elections, and qualify or disqualify the electors at their pleasure. This was never contemplated by the Legislature, and, in my opinion, the Act should not be so construed, and yet a reasonable and full effect and operation may be given to every part of it.

The Act must be read as making the last revised and certified list, if delivered to the Clerk of the Peace on or before the 15th of August, the one to be voted upon in case the writ of election shall issue *after* the lapse of one month from the time of the delivery of the list; and if the writ be issued before the expiration of the month, that the list to be used shall be the one which was last delivered within one month before the date of the writ, which will, I presume, be the one of the next preceding year. But

if the writ of election be issued more than one month after the 15th of August—that is, after the list for that year should have been completed and delivered—then it appears to me it is the list for that year which should be used as soon as it is made up and completed. In no other way, unless by disfranchising, it may be, a large body of persons, which is a consequence not to be tolerated if it be possible to avoid it, can the lists “be valid and effectual for the purposes of this Act, even though not so completed and delivered by the said period of time.”

No wrong is said or even surmised to have been done to the petitioners, or to any one, by the use of the one roll rather than the other, and, in my opinion, the right roll was used, on the facts stated, and the case fails.

The questions submitted I answer as follows:

1. The objection as to the list was not open to the petitioners without amendment.

2. The learned Judge had power to amend, under the 34 Vic., ch. 3, sec. 33.

3. The election is not void nor voidable by reason of the use of the list for 1870, for the township of Gainsborough.

4. In my opinion, on a scrutiny, the list for 1870 should be used.

5. The petitioners, as electors, would not be prevented from taking the objection in question merely because the candidate had not taken it, or had acquiesced in the objectionable proceeding; but, in my opinion, the not objecting to or acquiescing in what was done by the candidate can be relied on against the petitioners, when they claim to have him returned and seated as having been duly elected.

I may refer to the following cases on the construction of statutes applicable to this case: *Regina v. Mayor, &c., of Rochester*, 7 E. & B. 910, affirmed in Ex. Ch., E. B. & Ex. 1024; *Brumfitt v. Bremner*, 9 C. B. N. S. 1; *Morgan v. Parry*, 17 C. B. 334; *Hunt v. Hibbs*, 5 H. & N. 123.

## IN RE FOSTER AND THE GREAT WESTERN R. W. CO.

*G. W. R. W. Co.—16 Vic., ch. 99, sec. 7.—Money paid into Court—Application for.*

F., the owner of land required for the Canada Air Line Railway, having refused the sum tendered by the company, an arbitration was had, which awarded to him \$800, and settled the costs of the award at \$31. This sum he refused to receive without his costs and interest from the date of the award; whereupon the company paid it into Court, with six months' interest, under 16 Vic., ch. 99, sec. 7, and a notice was published as that clause directs. F. then applied for a rule upon the company to shew cause why the money should not be paid to him, with interest and costs of the arbitration, and why they should not join in the conveyance, or give an undertaking to secure the construction and maintenance of a farm-crossing, which the award provided for.

*Held*, that the application must be refused, for that the company having taken all proper proceedings under the section mentioned, had acquired the title, and had nothing more to do; and the applicant's proper course was to file his claim and apply as the section provides.

DURING this term, *James A. Miller* moved for a rule *nisi*, calling on the railway company to shew cause why \$800 paid by the company into Court, should not be paid out to the applicant, Foster, and why the company should not pay to Foster interest on the \$800 from the date of publication of the award made in this matter, also his costs attending the arbitration, and the costs of this application; and why the company should not join in the conveyance tendered them, or give an undertaking under the seal of the company securing the construction and maintenance of the crossing as awarded and agreed upon.

The application was based on an affidavit of Foster, who stated that he was the owner of land in question: that on the 27th of December, 1870, he was served with a notice from the company, which was annexed, and which notified him that the sum of \$546, tendered to him at the time of the service, was the purchase money, &c., which the company was willing to pay as compensation for  $7\frac{4}{10}$  acres, the land in question, taken for the use of the Canada Air Line Railway, &c.; and the notice stated that the company would provide a railway crossing at grade for farming purposes over the said land taken on said lot 41, and that if the

\$546 was not accepted, the company would pay the same into this Court for the use of the owner, &c.: that the \$546 was tendered, and that he, Foster, refused to accept it as not sufficient: that the question of compensation was left to arbitration, and that the arbitrators made their award on the 30th June last, a copy of which was annexed, which recited the submission, &c., and appointment of the three arbitrators to act "in assessing the value of the said lands so taken by the said company, and the damages thereto, in consequence of the said intended railway being built and constructed thereupon. The said railway company undertaking to construct and maintain for the use of Foster, his heirs and assigns for ever, one farm crossing under the railway, to connect the portions of lot 41 which are severed by the lands taken by the railway, of a width of 14 feet, with head room of 14 feet." It then set out that a majority of the arbitrators awarded that the company "should pay to the respective person or persons entitled to receive the same the sum of \$800, for the said lands, being, &c., (describing the land in question) so taken and required by the said company as aforesaid, and for the said damages, which said sum of \$800 they assess and declare to be the full value of the fee simple of the said lands, and the damages aforesaid, and the amount of their award in the premises. And they do further by these presents specify and settle the costs of this award at and to be the sum of \$31. In witness whereof," &c.: that on the 22nd August last, the company tendered Foster \$800, and asked him to execute a deed of the land, which was, attached to the affidavit: that Foster refused to receive the amount without his costs and interest on the amount from the date of the award: that the company paid the \$800 into this Court, and that a notice was published in a newspaper in the Town of Cayuga, in September last, which was also annexed, and signed by the Clerk of this Court.

The affidavit also stated that while the arbitrators were examining the land, the engineer of the company was



present, who on behalf of the company stated that a crossing would be built on the land, and that they would at all times keep and maintain the same, &c., the crossing to be fourteen feet from the railway overhead, and at least 14 feet wide; and that at the time the deed was tendered to him for execution, he, Foster, claimed that the same should be inserted in the deed; and that the company should sign and seal it with their corporate seal. And the affidavit further set out, that the costs stated in the award were merely the fees of the arbitrators.

It also appeared, from correspondence between the solicitor of the applicant and the solicitor of the company, that the latter denied their liability to pay Foster's costs under the submission; and that they would not execute the deed, saying that "the tenure by the company of the land is subject to the observance of a duty to provide crossings, &c., &c. This duty cannot be separated from the enjoyment of the land." The deed prepared by the company contained this stipulation immediately following the *habendum*—"The said railway company undertaking to construct and maintain, for the use of the said Anderson Foster, his heirs and assigns for ever, one farm crossing under the railway, to connect the portions of lot number 41, which are severed by the lands taken by the railway, of a width of 14 feet with head-room of 14 feet."

MORRISON, J., delivered the judgment of the Court.

The first Statute under which the Great Western Railway Company was authorized to acquire lands for their railway, was the 4 Wm. IV., ch. 29, which first incorporated the company under the name of the London and Gore Railroad Company. The name was changed by the 8 Vic., ch. 86; and by the 9 Vic., ch. 81, the charter was amended; and by the 26th section, provision was made for the valuation of lands required and taken by the company; and afterwards the 16 Vic., ch. 99, was passed, containing many new provisions in relation to this company, and under that Act all the proceedings set out in the applicant's

affidavit were had. And the question is, whether we have any authority to grant an application of this nature.

We think not. Under the 5th and 6th sections the tender of the \$546 was first made, and being refused was paid into Court, and arbitrators duly appointed, who awarded \$800. The company tendered that amount to the applicant, who refused to receive it, and he also declined to execute a conveyance of the land.

We have now to consider the effect of the 7th section, under which the \$800 was paid into Court. That section is very peculiar in its terms. It enacts that whenever any sum of money shall be awarded to be paid by the company for any land, &c., the sum awarded shall be the compensation to be paid by them for the land, and shall stand in the stead of such land, &c. Provided, that if any party to whom the compensation shall be payable, shall refuse to execute the proper conveyance and warranty, &c., or if for any other reason the company shall deem it advisable, it shall be lawful for the company to pay such compensation into the office of either of the Superior Courts of Common Law for Upper Canada, with the interest thereon for six months, and to deliver to the Clerk of the Court an authentic copy of the award, and such award shall thereafter be deemed to be the title of the company to the land therein mentioned; and a notice, in such form and for such time as the said Court shall appoint, shall be inserted in some newspaper published in the county in which the land is situate, which shall state that the title of the company, that is, the award, is made under that Act, and shall call upon all persons entitled to the land, &c., to file their claims to the compensation or to any part thereof; and all such claims shall be received and adjudged upon by the Court; and that these proceedings shall for ever bar all claims to the lands, or any part thereof, &c., as well as all mortgages, &c.; and the Court shall make an order for the payment, &c., of the compensation, and for the securing of the rights of all parties interested, &c. And the section makes provision as to the costs and the six months' interest.

It appears that the company have, under the authority of that section, paid the money into this Court with the six months' interest, and have taken all the necessary proceedings, and the proper notice has been published and signed by the officer of this Court, (Mr. Dalton) notifying all parties to file their claims to such compensation. On this being done, the company apparently have nothing more to do on their part. It seems to us that by force of the Statute the award is their title to the lands.

Under the sixth section, upon payment of the amount, \$546, which they at first tendered into Court, the company were authorized and empowered to take possession of the lands; and it provides a most summary mode of obtaining the possession should any resistance be offered. Then the seventh section provides, that after the payment into Court of the amount awarded, with six months' interest, and delivering a copy of the award to the Clerk of the Court, such award shall thereafter be deemed to be the title of the company to the land; and further provides that, after the publication of the notice required, the proceedings shall for ever bar all claims whatever to the lands. It appears to us that to enable this applicant to obtain the money paid into Court, he must file his claim as stated in the seventh section, and apply for an order for the payment to him.

We therefore think that we should not grant the rule.

*Rule refused.*

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## BROWN V. LAMONT.

*Charter of vessel—Delay in arrival of cargo—Refusal to ship.*

The plaintiff's vessel, then at Kingston, was engaged by defendant about the 24th October, 1869, to carry to Kingston a cargo of wheat, part of which was to be shipped at Dresden or Chatham, and the rest at Detroit. She left Kingston about the 27th October, and, owing to stress of weather, but to no fault of the plaintiff, did not reach Detroit until the 15th November, when it seemed improbable that she would have time to ship her cargo and get back to Kingston that season. The defendant on this ground refused to load her, for which the plaintiff sued.

*Held*, that he could not recover; for defendant was not bound to ship his wheat unless the vessel arrived within a reasonable time, and, under the evidence, which is more fully set out in the case, he was justified in his refusal.

DECLARATION on an agreement made between the plaintiff and defendant, that the plaintiff's bark, the "Southampton," should sail from Kingston to the port of Dresden or Chatham, and also to the port of Detroit, and that the defendant should load her at either of the said ports of Dresden or Chatham, with such a quantity of wheat, at the rate of 12 cents per bushel, as would enable said bark to navigate the waters connecting Dresden or Chatham with Detroit, and should also at Detroit complete the load the vessel was capable of carrying, with wheat at the rate of ten cents per bushel, which load said vessel should carry to Kingston, and there deliver on payment of freight. Averment, that the plaintiff did all things necessary on his part to entitle him to have said cargo shipped at Dresden or Chatham and Detroit,<sup>§</sup> but defendant made default in loading her.

Second count: setting out the same agreement, and stating that defendant prevented the plaintiff from proceeding from Detroit to Dresden or Chatham with the wheat, although the plaintiff was ready and willing to complete his said voyage, and receive and carry the said wheat at the rate aforesaid to Kingston, whereby the plaintiff was deprived of great gains to arise from carrying said wheat, &c.

Third: Common money count, for the hire of the vessel.

Pleas,—1. Did not promise. 2. That the agreement was



conditional on the vessel arriving at Kingston in time to forward her cargo to Montreal that season. 3. That the plaintiff's vessel did not proceed with all reasonable despatch. 4. That the plaintiff discharged defendant from fulfilling the contract. 5. That the plaintiff was not ready to complete the voyage. 6. Never indebted. Issue was joined on all the pleas but the second, to which plea the plaintiff replied: 1st. Denying any agreement to arrive at Kingston at any particular time. 2nd. That the vessel did arrive in sufficient time to convey the cargo to Kingston before the close of the season.

The case was tried at Hamilton, before Galt, J., without a jury, in March, 1871.

It appeared that the bark "Southampton," which belonged to the plaintiff, was engaged on behalf of the defendant, on or about the 20th October, 1869, to carry a cargo of wheat to be shipped in part at the port of Dresden or of Chatham, in this province, and to be filled up at Detroit, in the state of Michigan, to be delivered at Kingston. Twelve cents per bushel were to be paid on wheat shipped at Dresden or Chatham, and ten cents per bushel on wheat shipped at Detroit. The "Southampton" finally left Kingston on Sunday, 27th October. She had actually sailed on the 24th, but was compelled to return. Owing to the weather she did not get to Port Dalhousie until the Friday following, and from adverse winds and rough weather she was prevented from reaching Detroit until the night of the 15th of November. On the following day the captain met the defendant, who told him he could or would not load him, as it was so late in the season that he could not get the wheat through to Montreal. At that time the defendant's wheat at Dresden had been shipped. The "Southampton" then proceeded to Cleveland, and not being able to load her with coal during that week, the captain laid her up there. The defendant offered to give the vessel the same freight in the spring, and to give the bark a dock at Chatham, and a warehouse for their rigging. The "Southampton" could carry from 21,000 to 22,000

bushels of wheat in all; and she could bring down from Chatham, where the water is shallow, from 8,000 to 10,000 bushels. It appeared that when the "Southampton" first left Kingston after the arrangement with defendant, she was to have gone to Hamilton for a cargo on her upward voyage, but the detention from weather causing her to return to Kingston, when she sailed on the 24th October, the intention of going to Hamilton seemed to have been abandoned. The evidence shewed that the "Southampton" was well fitted and found.

The defendant's agent, who made the contract for him at Detroit by telegraph, through Folger & Co., at Kingston, stated in evidence that the defendant applied to him to get a vessel so as to convey the grain to Montreal by the 20th November, so as to be able to insure it. He said that as soon as the "Southampton" arrived, he notified the captain that she was too late: that the grain could not be got to Montreal by the 20th November: that there was not time for her to get to Kingston by the 20th; and that it would have taken four days for her to go to Chatham. He said he had no doubt she would have got back to Kingston by the 20th November, and therefore he made no stipulation about it. By the testimony of another witness it appeared that on the 23rd November, 1869, the river on which Dresden lies was frozen up, though it opened again in eight or ten days. The defendant denied that Dixon, who engaged the vessel, was his agent further than to procure him a vessel to take the wheat so that it might be in Montreal by the 20th November at latest. Dixon stated he would, if the wheat had been shipped, have got his commission from the vessel. It was proved that the defendant had as much wheat at Chatham as the "Southampton" could carry from that port, and that he had made arrangements to complete the cargo at Detroit. Another witness swore that it would not have been possible to get the wheat from Dresden, which is on the Sydenham River, after the 16th November.

The learned Judge found that the vessel was detained by

stress of weather, without any default of the plaintiff: that the vessel did not arrive at such a time as that the plaintiff could reasonably have been required to ship his wheat, since it was too late for it to reach Montreal, and it must therefore have been stored at Kingston or some intermediate port; that the defendant refused to load the plaintiff's vessel with wheat when she did arrive (16th November), but offered to do so on the opening of the navigation in the ensuing spring. And he entered a verdict for the defendant, reserving leave to the plaintiff to move to enter a verdict for him, leaving the amount to be determined by the Court.

In Easter Term last, *Sadleir* obtained a rule *nisi* on the leave reserved, on various points of law, and also on the ground that the verdict was against the weight of evidence. He referred to this case as reported in 30 U. C. R. 392, when a new trial was granted.

During this term *M. C. Cameron*, Q. C., shewed cause, and *Sadleir* supported the rule.

DRAPER, C. J. OF APPEAL.—The Statute of Ontario, 33 Vic., ch. 7, sec. 6, seems to supersede the necessity for a new trial upon the objection that the verdict is against the weight of evidence, as the Court may pronounce the verdict which, in their opinion, the Judge ought to have pronounced. The facts in evidence shew that defendant had wheat in store at Dresden and Chatham, and had made arrangement for other wheat in Detroit, all which he wished to send immediately to Montreal. He applied to one Dixon, a freight and vessel agent at Detroit, to procure a vessel for that purpose. Dixon suggested that it would be easier to get a vessel to carry it to Kingston, and defendant agreed to this. On the 20th October, 1869, Dixon telegraphed to defendant, "Folger, of Kingston, has chartered for the bark 'Southampton' for your wheat, Dresden and Detroit, Canada; vessel *leaves Kingston to-day*; is it O. K.?" On getting defendant's assent, Dixon telegraphed to Folger



on the same date, "James Lamont, Chatham, Ontario, load bark 'Southampton' with wheat at Dresden or Chatham for Kingston, at twelve cents; fill out Detroit, ten cents."

Dixon stated that he had no doubt the vessel would have got back by the 20th November, and therefore did not make any stipulation about it. He also said he would have got his commission from the vessel, and that it would have taken the vessel four<sup>1</sup>/<sub>2</sub> days to get to Chatham.

The captain of the "Southampton" said that Folger Bros. applied to him; he was to pay their commission. He accepted the offer. He was then discharging his vessel. He left Kingston on the 24th of October, but only reached the four-mile point; the wind was ahead, and he anchored because he could not work the vessel. He returned to Kingston on the 26th to get some caulking done, and sailed on the morning of the 27th; arrived at Port Dalhousie on the 29th; and, passing through the Welland Canal, got to Port Colborne on Monday, 1st November. The defendant stated in his evidence that, having seen in a newspaper that the "Southampton" was going to Hamilton, he telegraphed to Dixon and received this reply,<sup>2</sup> dated at Detroit, 27th October, "That is a mistake, she is coming direct from K.; has passed the canal; had advices from Folger to-day."

On this evidence the learned Judge treated Dixon as making the contract as agent for the defendant, though Dixon's evidence is not explicit as to this, for his claim for commission would be on the vessel. However, he does state that defendant applied to him to get a vessel to go with wheat from Chatham, Dresden, and Detroit to *Montreal* by the 20th November. The defendant so far altered this as to agree to employ a vessel to go only to Kingston, the final destination being unchanged. It is not shewn whether Dixon made all this known to Folger Bros. I infer that he did not, for he says he had no doubt that the vessel would get back by the 20th November, and therefore made no stipulation about it. I cannot reconcile the statements represented by Dixon in his telegram of 27th October as having come from Folger, with the captain's evidence that



he did not sail from Kingston until the morning of that day. The telegram, to my apprehension, means that Folger's advices represented that the "Southampton" had passed the canal on the 27th, which is manifestly a false representation, for she did not arrive at Port Colborne until the 1st November, nor at Detroit until the night of the 15th, and it is uncertain at what time she could have reached Chatham, as it would depend on wind and weather.

This contract would not bind defendant to ship his wheat, unless the "Southampton" arrived in a reasonable time, and the plaintiff must be deemed to have engaged himself to that extent. At whose risk was the delay? Is the exception of the act of God, &c., to be held to be implied in the plaintiff's favour, so that if the vessel had been frozen up at Port Colborne, he could have come up to Chatham in the following spring and demanded a cargo? Conceding that if the plaintiff were sued for not having his vessel there in a reasonable time, he might excuse himself upon this implied exception, is it the same thing when, after a lapse of time inexcusable on any other ground, he claims the performance from the defendant? Besides, the whole delay did not arise from this cause. If he had sailed on the 20th October from Kingston, what is to establish that he might not have arrived at Detroit by the 1st of November? And according to the telegram from Dixon as to Folger's chartering the vessel, she was to sail on the 20th October from Kingston; as it was, nearly four weeks elapsed from the 20th October before the vessel reached Detroit. In considering the evidence, I cannot consider it proved, (but rather the other way) that the bark could have gone on to Chatham on the 16th November; have loaded 8,000 or 10,000 bushels there, then returned to Detroit and completed the loading to 21,000 or 22,000 bushels, and then have returned to Kingston that season. It was at least exceedingly improbable, and if so it appears to me to be unreasonable to hold that defendant must ship his wheat at so late a period that he would probably have

found it difficult to effect insurance upon it, and must have stored it at Kingston or at some more western port.

On the whole, I agree with the view of the learned Judge at the trial. I think his verdict right, and I am opposed to disturbing it.

MORRISON, J., and WILSON, J., concurred.

*Rule discharged.*

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BERRY V. GARRARD.

*Covenant.*

Plaintiff and defendant entered into an agreement under seal, by which the plaintiff agreed to convey to defendant certain land "for \$300," payable in the manner specified. *Held*, to amount to a covenant by defendant to pay the money.

DECLARATION upon an agreement, dated 16th of October, 1863, whereby the plaintiff agreed to convey to defendant, in fee, the north west quarter of lot 16 in the 16th concession of Garrafraxa, for the sum of \$300, payable thus: \$100 on the 1st of April, 1864, and \$50 on the 1st day of April, in each year, until the \$300 and interest should be paid. Averment that the plaintiff conveyed the premises to defendant, who accepted the same at and for, amongst others, the consideration of \$300, which the defendant agreed to pay, as above mentioned. Breach, that defendant hath not paid the \$300.

Common money counts were added, but there was no count for lands sold and conveyed.

Pleas, 1. *Non est factum* ; and, 2. Payment.

At the trial before Gwynne, J., at Toronto, (this being a County Court case brought in the County of York,) a witness proved the execution of an agreement dated 16th October, 1863, by both plaintiff and defendant. The plaintiff agreed to convey to defendant the land above mentioned "for \$300, lawful money of Canada—\$100 on or before the first day of April, 1864, and \$50 on the first day of April each

year till paid," but there was no agreement expressed on the part of the defendant to pay the \$300. He did, however, agree to convey to the plaintiff, in fee, the east half of lot 6 in the first concession of Luther; and each party agreed with the other that they might enter on and occupy the different premises on the 1st day of November.

Upon this agreement being read, it was arranged that a verdict be entered for the plaintiff for \$285.68, with leave for defendant to move to enter the verdict for him, if in the opinion of the Court he was entitled to a verdict on the proper construction of this agreement.

Defendant's counsel wished leave reserved to add a plea, but the learned Judge declined, leaving him to apply, as he might be advised, for a new trial upon affidavits.

In Easter Term last *Anderson* obtained a rule *nisi* to set aside the verdict for the plaintiff, and to enter a verdict for defendant or a nonsuit, on the ground that the instrument produced did not support the declaration; or for a new trial, on grounds disclosed on affidavits.

During this term *W. McDougall*, shewed cause, and *Anderson* supported the rule.

DRAPER, C. J. OF APPEAL, delivered the judgment of the Court. [After stating the affidavits on both sides, which it is considered unnecessary to report.]

We think the application for a new trial on affidavits is completely displaced.

As to the motion for new trial or nonsuit, it is a different matter, but there certainly is no express covenant in the agreement declared on and proved at the trial for payment of the money. The agreement is signed and sealed by both parties, and begins "*It is agreed* by and between" the two parties as follows: "I, the said Henry Berry, do hereby agree to convey to the said Joseph Garrard" the particular land "for \$300," to be paid as already stated, not expressing by whom the payment is to be made. The question is, does this agreement contain a covenant to pay.

The agreement in this case is almost the counterpart of that in *Pordage v. Cole*, 1 Saund. 319 l. There the words were "It is agreed between Dr. John Pordage and Bassett Cole, Esquire, that the said Bassett Cole shall give unto the said Doctor £775 for all his land, with Ashmole House, thereunto belonging, with the brewing vessels as they are now remaining in the said house, and with the maltmill and wheelbarrow. In witness whereof we do put our hands and seals" &c. Here the words are "It is agreed" by and between Henry Berry, of, &c., and Joseph Garrard, of, &c., as follows: "I, the said Henry Berry, do hereby agree to convey to the said Joseph Garrard in fee simple" a certain lot of land, "for \$300 lawful money of Canada, \$100 on or before 1st of April, 1864, and \$50 on the 1st day of April each year till paid. And the said Joseph Garrard doth hereby agree to convey to the said Henry Berry in fee simple" a certain lot of land; with an agreement that each party may enter and occupy the "different" premises on a named day.

In the former case the Court held that if the plaintiff, who sued for the money, had not conveyed the land to the defendant, he had also an action of covenant against the plaintiff upon the agreement contained in the deed, "*which amounts to a covenant on the part of the plaintiff to convey the land.*" In like manner, the agreement in the present case will amount to a covenant on the part of the defendant to pay the money, for it is proved that both plaintiff and defendant sealed the agreement, though it is not so stated in the declaration.

We think the rule must be discharged.

*Rule discharged.*

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## HENDERSON V. BARNES.

*Negligence—Contradictory Evidence—Nonsuit.*

The defendant having charge of the plaintiff's colt, took it to a blacksmith's shop to be shod for the first time, and having tied it there went out. The colt pulling back threw itself, and received injuries of which it died. The plaintiff sued defendant for negligence in so tying the colt instead of having it held while being shod; and several witnesses were of opinion that what defendant had done was improper, while others thought he had adopted the proper plan.

*Held*, not a case in which there should be a nonsuit, on the ground that the evidence was consistent either with the existence or non-existence of negligence; but that the question was for the jury. *Cotton v. Wood*, 8 C.B.N.S. 568, and *Jackson v. Hyde*, 28 U. C. R. 294, distinguished.

APPEAL from the County Court of Wentworth. The first count was upon an agreement by defendant to break and train a horse of the plaintiff to drive in harness, alleging it to be the duty of defendant to take due and proper care of the horse. *Breach*, that defendant did not break and train the horse, nor take due and proper care, &c., whereby the horse was injured and died, &c.

The second count was similar, with the additional stipulation, that defendant agreed to have the horse properly shod, &c. *Breach*, that defendant did not break and train the horse, nor did he have the horse properly shod, whereby the horse became injured and died.

All the allegations in the counts were traversed by six pleas. The material facts were, that the defendant, who had charge of the plaintiff's colt to break, took it to a blacksmith's shop to be shod for the first time, and tied it to a ring in the wall by a rope round the neck, and went out; and that the colt pulling back threw itself, and received an injury in the head, from which it afterwards died. The plaintiff charged that defendant, under the circumstances, should have remained with the colt, or had it held while it was being shod.

At the close of the plaintiff's case, upon the first trial, it was objected that no negligence was made out on the part of defendant; and it was agreed that the case should go to the jury, with leave reserved to defendant to move to enter

a nonsuit. The defendant then called several witnesses, and there was a verdict for the plaintiff, and \$120 damages.

In the following term a rule *nisi* was granted to enter a nonsuit, or for a new trial, the verdict being perverse and contrary to law and evidence, &c. After argument, the learned Judge below made the rule absolute for a new trial, costs to abide the event.

Against this decision the defendant appealed, upon the ground that the weight of evidence, when duly and properly considered, was not reasonably sufficient to justify the jury in finding the verdict: that there was no evidence to go to the jury upon which they could or ought to have found such a verdict; and that the Judge should have entered a nonsuit. The plaintiff also appealed, on the ground that the case was one for the jury, and that there was no ground for disturbing the verdict.

These appeals were argued in Hilary term last, by *Anderson*, for plaintiff, and *R. Martin*, for defendant. In the same term both appeals were dismissed, the Court holding that there was evidence to go the jury, so that the learned Judge was justified in refusing to nonsuit; and that the granting of a new trial upon the evidence was a matter entirely within his discretion, which should not be interfered with on appeal.

The case was then again tried. At the close of the plaintiff's case, the learned Judge declined to nonsuit, but at the close of the defence he was of opinion that the whole evidence then disclosed a case in which the evidence was consistent with negligence or no negligence, the leading facts not being disputed, and the conflicting testimony of experienced witnesses shewing that some considered the conduct of the defendant in tying the horse, &c., as he did improper, while others considered the defendant adopted the proper mode; and he was of opinion that the case came within the principle of *Cotton v. Wood*, 8 C. B. N. S. 568, and *Jackson v. Hyde*, 28 U.C.R. 294; saying that if he had the power at the close of the case to nonsuit he would do so. The plaintiff's counsel, on this expression of opinion, con-

sented to the case going to the jury, with leave reserved to defendant to move to enter a nonsuit. The jury, after an adverse charge, found for the plaintiff \$120. In the following term a rule was made absolute to enter a nonsuit, and against that decision this appeal was brought.

*Anderson* for the appellant. The facts here are the same as in the previous appeals, except that there were more witnesses called. There was contradictory evidence as to the contract, and there could, therefore, be no nonsuit on that point. Nor was the nonsuit justified on the main question, as to negligence. *Jackson v. Hyde*, 28 U. C. R. 294, was cited to shew that at the conclusion of the defendant's evidence there should have been a nonsuit; and that if persons of intelligence and character, being called upon such a question as the present, say that in their opinion there was no negligence, that ends the case. What that decision really establishes is that, when a great number of scientific witnesses are called upon a scientific question, and say that, having heard the undisputed facts, they would have done what the defendant did, he is to be regarded as in the same position as if he had taken their opinion before acting. Much turns, too, upon the peculiar character of that case. It was an action against a surgeon for malpractice in amputating an arm above instead of below the elbow, and the evidence was purely scientific. This is not a case of scientific evidence at all, but of the testimony of persons more or less acquainted with the management of horses, and probably the witnesses were no more experts than any of the jurors. *Cotton v. Wood*, 8 C. B. N. S. 568, is clearly distinguishable in its facts.

*R. Martin*, contra. The nonsuit was right. On the previous appeals the Court simply decided that they would not interfere with the Judge's discretion. Here his decision is upon a question of law, and it is supported by the authorities. Where there are different modes of doing an act, all skilful and approved, and one of them is followed, there can be no negligence, although opinions may differ as

to which mode is preferable; and that was the case here upon the evidence. The Judge clearly had power to nonsuit after hearing the defendant's witnesses, and the evidence given by the defendant may be used for the purpose of a nonsuit: *Davis v. Hardy*, 6 B. & C. 225; *Giblin v. McMullen*, L. R. 2 P. C. 317, 339. The defendant was, according to the weight of evidence, an unpaid bailee, bound only to use reasonable skill and to follow directions; and at the conclusion of the whole case, it was clear that no verdict against him could be allowed to stand. *Maitland v. Tylee*, 7 C.P. 335; *Bradley v. Dunipace*, 31 L.J. Ex. 213; *Blakemore v. Bristol and Exeter R. W. Co.*, 8 E. & B. 1035; *McCarthy v. Young*, 6 H. & N. 329; *Moore v. Mourgue*, 2 Cowp. 479; *Shiells v. Blackburne*, 1 H. Bl. 159; *Bank of Upper Canada v. Bradshaw*, L. R., 1 P. C. 479; *Giblin v. McMullen*, L. R. 2 P. C. 317.

MORRISON, J., delivered the judgment of the Court.

It is much to be regretted that this case has not been finally disposed of. There have been three trials in the Court below, and it has been before us on appeal a few terms since. I fear much more than the value of the unfortunate colt has already been spent in litigation. As the case is again before us, we must deal with it irrespective of these considerations.

On the part of the plaintiff, a case was made out to go to the jury, and I think there was some evidence of an undertaking on the part of defendant to get the horse shod.

Upon reading the testimony of some twenty witnesses examined at the trial, I do not think the case is one strictly within the principles laid down either in *Cotton v. Wood*, 8 C. B. N. S. 568, or *Jackson v. Hyde*, 28 U. C. R. 294. It is quite distinguishable from *Cotton v. Wood*. There the defendant's omnibus was going at an ordinary rate on the right side of the road; the plaintiff's wife was attempting to cross the street from the same side, not on an ordinary crossing, and seeing another vehicle coming from the opposite direction, got alarmed and turned back to



avoid it, and the omnibus came in contact with her. The Chief Justice said, "What is the ground for imputing negligence and breach of duty to the defendant's servant? One of the plaintiff's witnesses said, that the driver was looking round at the time to speak to the conductor. That alone clearly would be no affirmative proof of negligence. \* \* As far as the evidence goes, there appears to me to be just as much reason for saying that the plaintiff's wife came negligently into collision with the defendant's horses and omnibus, as for saying that the collision was the result of negligence on the part of the defendant's servant. \* \* Where it is a perfectly even balance upon the evidence, whether the injury complained of has resulted from the want of proper care on the one side or *on the other*, the party who founds his claim upon the imputation of negligence fails to establish his case."

*Jackson v. Hyde* belongs to a different class of cases. Amputation of the plaintiff's arm was necessary, and, as said by my brother Wilson, in the judgment, there negligence could not be assumed from the mere act done. Medical witnesses stated they would have advised an amputation below the elbow, while other medical witnesses said they would have advised amputation above. None said that the defendant acted ignorantly, &c., as charged in the declaration. The case rested entirely upon skilled testimony strictly, and was one altogether of surgery: the plaintiff's complaint being, that the operation could have been safely performed by amputating below the elbow, and in that case he would have had the use of his elbow-joint; but many skilled surgeons testified that it was safe to amputate above, and that they would have so advised the defendant.

In the present case, it can hardly be said that any question of skill or science arises. It is, properly speaking, a mere matter of opinion, and any juror could, after hearing the facts, equally well judge of the propriety of the acts complained of, as any witness called to pass his opinion as to them. Affirmatively there was abundance of testimony of

negligence in the opinion of the plaintiff's witnesses. Can we say that it is not evidence of negligence to take a colt to a blacksmith's shop to be shod for the first time, to tie him there by the neck, and to leave it so tied with no person to look after the animal or watch it, and being so left it gets injured, and, as alleged, from the colt being so tied and unattended. Witnesses may be called and testify that they would have done just what the defendant did, and that they could see no negligence; but it is obvious there are various circumstances to be considered in cases of this nature; for instance, much depends upon the temper and character of the horse; what would be considered a proper course with one horse, might be a very negligent way in treating another.

On the whole, we do not think this case is one within the decision in *Jackson v. Hyde*, or the principle laid down in *Cotton v. Wood*, but that it is one of evidence and entirely for the jury to pass a judgment upon. Whether they should have found as they did, is another thing. A Judge may properly entertain a strong opinion upon the evidence in a cause, but it is impossible at times to say in what light a case like this is considered by a jury. The learned Judge, in his judgment, stated that if he had not power to order a nonsuit he would have made the rule absolute for a new trial, as the verdict was contrary to law and evidence and to his charge.

We, therefore, think that the appeal must be so far allowed, reversing the judgment below as to entering a nonsuit, the Court below to make the rule absolute for a new trial, costs to abide the event.

*Appeal allowed.*

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## ANGUS MORRISON V. STEER.

*Deed—Statute of Elizabeth—Sheriff's sale—Registration of judgment—Estoppel.*

In ejectment the plaintiff claimed through a deed from J. M. to J. The defendant claimed through a purchase at Sheriff's sale under execution against J. M., at the suit of one C., and he contended also that that deed from J. M. to J., was void under the Statute of Elizabeth. Both J. M. and J., however, swore that this deed was made in good faith for a valuable consideration; provision was made for paying off C.'s judgment out of the purchase money; and it did not appear that J. M. had any other creditors:

*Held*, That the deed was good.

The deed from J. M. to J. was made on the 4th of February, 1857. C.'s judgment against J. M. was entered on the 21st June, 1855, and registered on the 22nd in the Registry office. On the 6th July, 1859, the Sheriff sold the land under a *pluries fi. fa.* tested 31st March, 1858:

*Held*, that the plaintiff's deed could not transfer the estate previously vested in J.

After the Sheriff's sale, J. entered into an agreement with D., the purchaser at such sale, by which D. covenanted to convey the land to J. on payment of \$743 within five weeks; the agreement to be void on non-payment. The money was not paid. D. conveyed to M., with whom J. made an agreement, that on his paying M. \$1,200 within a year M. would convey to him: that J. might sell within the year, and should have all he could get above \$1,200; and that M. should have possession, which J. accordingly gave to him. After this J. conveyed to the plaintiff:

*Held*, that neither agreement estopped the plaintiff from objecting to the title derived under the Sheriff's sale, or from setting up his legal title.

EJECTMENT, brought 5th September, 1871, for that part of the north half of lot 13, in the 4th concession of the North Gore of the township of Chatham, in the county of Kent, that lies on the west side of the North Sydenham river (save and except two acres near the south west angle of said north half deeded by one John Morrison to one Thomas Murphy), containing eighty acres, more or less.

The plaintiff claimed title as the grantee, by deed dated 27th July, 1871, of Lionel H. Johnson, who was the grantee of John Morrison, who was the grantee of William Dunlop, and by a chain of title to the grantee of the Crown; and also by length of possession.

The defendant, besides denying the title of the claimant, asserted title in himself under a deed from one Hector McLean, who derived title from the vendee of the Sheriff

of the county of Lambton, who claimed as such vendee the estate and interest of one John Morrison (who derived title from the Crown), which was sold by the sheriff under a writ of *fi. fa.* against the lands and tenements of said John Morrison.

The case was tried at Chatham, before Gwynne, J., without a jury, in October, 1871.

The land in question was granted by letters patent from the Crown, dated 4th March, 1850, to William Dunlop, in fee, and he, by deed dated 25th November, 1850, conveyed the same to the plaintiff's father, John Morrison, who had been in occupation from the year 1840; and who, on the 4th February, 1857, conveyed the same premises to Lionel H. Johnson.

John Morrison swore that Johnson took possession, and had a tenant there for two or three years; that he (Morrison) was sole owner, and had cleared about fifty acres when he sold to Johnson. On the same day that John Morrison signed this conveyance Johnson executed a deed, agreeing that if a judgment obtained by Hiram Cook and another against Morrison required to be paid, Johnson should pay it; but if not, then Johnson was to pay £212 10s. to Morrison, by a named day, this amount being the balance due on the sale of the land. Morrison swore that he was compelled to sell the land to meet this claim if it should be sustained. He represented that it was a verdict only, then recovered against him, and this sale was *bond fide* made to meet the verdict if it should be confirmed; that the sale was for \$2000, and that he got the difference between that sum and the amount of the claim in suit against him. He said that the lot was in the market in the spring, and that last July the plaintiff, his son, bought it from Johnson for \$200. He had understood that one Hector McLean had sold it to defendant for \$1,800, and he (the witness), thought it worth that. John Morrison had given a mortgage, dated 26th February, 1856, upon the land to James Robert Johnson, to pay £320 in two years, which was discharged on the 10th February, 1857. John Morrison did not receive this sum from the mortgagee; he



could not state more than \$70 which he had received, but he said that afterwards Lionel Johnson bought that mortgage, and gave it to the plaintiff. He was present when the plaintiff bargained with Johnson for the land. He gave a very lame account of what the plaintiff paid to Lionel Johnson, and said he never paid James R. Johnson on the mortgage to him ; that since the sale by the sheriff the whole thing was dropped, for it was out of his power to do anything with it. The evidence of this witness was very unsatisfactory. He affirmed very distinctly that his arrangement with Johnson was not to defeat his creditors, but to secure them ; and that a large balance in the price of the property was payable to him, though he gave a most confused account as to what he got, except as to 300 or 400 cords of wood ; and even as to that he could not be at all precise as to quantity.

But the evidence of the purchaser from him (Lionel H. Johnson), was of a different character. He said he first spoke of purchasing in 1856 ; he was aware of the difficulty with Hector McLean, who, as appeared during the progress of the case, was agent for the plaintiffs in the suit of *Cook et al. v. John Morrison*, judgment in which case appeared to have been entered on the 21st June, 1855. His statement was quite consistent with the agreement under seal, dated 4th February, 1857 ; and he said that, besides the undertaking to satisfy this judgment, which was assumed in the agreement at \$850, he paid John Morrison a little over \$1000. He also placed the mortgage to James H. Johnson (no connection, he explained, of his own), in a much more favourable light than it appeared from the first witness's statement, for he said both the parties to that mortgage told him that only about \$200 had been advanced upon it, and he paid that amount, whatever it was, as part of what he had to pay John Morrison. He entered into possession in the following spring, and hired a man to work it ; and afterwards rented it, and so remained in possession until 1862-3. Subsequently to the purchase, and prior to the sheriff's sale, he became embarrassed and unable to pay the

judgment, and then he sold to the plaintiff. The reason for his selling for so low a price was, he said, to avoid further litigation. The defendant called on him, enquiring if he had any claim, and was told he had, and intimated a wish to buy. John Morrison never returned to the lot after this witness entered. The defendant spoke of purchasing from the witness before he purchased from McLean, and the witness told him all about his purchase, and shewed him the papers. Johnson said the transaction was notorious, and he believed both McLean and Davis, the purchasers at the sheriff's sale, were aware of it. After the sale he agreed with Davis to pay the judgment within a limited time, and to take a conveyance from him of the land, but he failed in raising the money (a), and he, about three years after that, made a similar arrangement with McLean, but was unable to fulfil it. He then had a tenant on the land, who had been served with an ejectment summons. He said he sold low to the plaintiff because the title was in dispute, and it involved a law suit; that he supposed the sheriff's sale cut him out. He said he gave up possession of the house to McLean, upon an agreement in writing that he (witness), should have whatever the place sold for over \$1,200.

The learned Judge found a verdict for the plaintiff, with leave to the defendant to move to enter a nonsuit or verdict in his favour.

*Becher*, Q. C., obtained a rule *nisi* accordingly, on the ground that the conveyance from Morrison to Johnson was

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(a) The agreement was not produced, and it was objected by the plaintiffs that the proof of search was insufficient to let in secondary evidence. Subject to this objection, a memorial of the agreement was put in. It bore date 6th July, 1859, and was registered on the 21st August, 1860. After reciting that the land mentioned had been that day sold by the sheriff to Davis, the attorney for the execution plaintiffs; that Johnson had agreed to buy said land from Davis, and pay for it in five weeks, \$748 18c., and interest from the 21st June, 1855, and that Davis had agreed to convey to him by a deed of quit claim, the agreement proceeded: "Now this agreement witnesseth, that the said Frederick Davis covenants and agrees to convey to the said Johnson the said lands on or before the time aforesaid, on payment of said sum and interest. *Provided always*, that if the said amount be not paid within the time aforesaid, the said agreement shall be null and void, and the said Johnson shall have no claim on said Davis, either at law or in equity, for a conveyance of said property." In witness, &c.

fraudulent and void: that the plaintiff was estopped from disputing the defendant's title; and that on the law and evidence defendant was entitled to succeed.

*Robinson*, Q. C., shewed cause. The deed is not void under the Statute of Elizabeth, for it was made expressly to obtain the means of paying the Messrs. Cook, who held the judgment, and there was no proof that John Morrison had any other creditors. This Statute was very fully considered in *Moffatt v. Smith*, 28 U. C. R. 486, and the decisions upon it are there referred to. *Morrison v. McLean*, 7 Grant 167, explains the connection of McLean with the judgment.

Assuming the deed to be valid, the sheriff's sale could not defeat the plaintiff's title. The judgment against John Morrison was recovered on the 21st June, 1855, and registered on the 22nd. He conveyed to Johnson on the 4th February, 1857, and the sale under the *fi. fa.* was not until 1859. The act then in force as to the registration of judgments, made the conveyance void only as against subsequent judgment creditors who should first register, and here the judgment was before the conveyance: *Thirkell v. Patterson*, 18 U. C. R. 75; *Wales v. Bullock*, 10 C. P. 155; *Fraser v. Anderson*, 21 U. C. R. 634; *Bank of Montreal v. Thomson*, 3 E. & A. 239. The agreements with Davis and with McLean were not produced, and there was clearly no sufficient proof of search as to either to let in secondary evidence. At all events, they could have created no estoppel.

*Becher*, Q. C., contra, contended that the deed to Johnson, all the circumstances attending which the plaintiff had knowledge of, was void under the Statute of Elizabeth, commenting upon the evidence, more especially upon that of the grantor, John Morrison, and citing *Bank of Upper Canada v. Thomas*, 2 E. & A. 502; *Crawford v. Meldrum*, 3 E. & A. 101. He argued also, that the agreements by Johnson with Davis and with McLean were sufficiently proved: that Johnson by these expressly recognized the title derived by the sheriff's sale, agreed to purchase it, and



afterwards gave up possession to McLean; and that the plaintiff, claiming under Johnson, was estopped from denying such title.

The argument upon the other points is omitted, as the judgment does not proceed upon them.

DRAPER, C. J. of Appeal, delivered the judgment of the Court.

The cases on the Statute of Elizabeth were so fully gone into in the case of *Smith v. Moffatt*, reported in appeal in 28 U. C. R. 486, that it is unnecessary to enter upon them again. I have seen no reason to adopt any change in my expressed views on the effect of those decisions. Applying them to this case, we think the transaction between John Morrison and Lionel H. Johnson was as between themselves a *bonâ fide* sale and transfer, based upon valuable consideration: that at the time it was made there was, so far as the evidence shews, no execution against John Morrison's lands in the Sheriff's hands; that so far from being a transaction intended to delay or defeat the only creditors we hear of, namely, Cook and Cook, provision was expressly made for their payment, and the case was one of those which are pointed out by Hagarty, J., in *Smith v. Morton et al.*, 27 U. C. R. 104: "sales made for the express purpose of raising money to pay debts, or to discharge an expected execution."

As to the estoppel: the plaintiff and defendant both derive title under John Morrison. The plaintiff's sole title is by deed from Lionel H. Johnson, and each of these parties had some knowledge (Johnson especially) of the outstanding judgment of *Cook et al v. John Morrison*. Johnson (his wife joining to bar dower) executed a conveyance to the plaintiff, who did not execute it; it is dated 27th July, 1871.

The defendant's title depends on the Sheriff's sale and conveyance. Johnson was at the sale. He states in his cross-examination: "I forget whether I forbade the sale, but I claimed an interest in the land; . . . that Davis



knew at the time all about his (Johnson's) agreement with John Morrison as to the judgment;" that Davis said all he wanted was that the judgment should be paid; that he would give time for Johnson to pay it to him, and then he would give up all the claim he had to the land. An agreement (dated 6th July, 1859,) was come to, and was reduced to writing, by which Davis covenanted to convey the land on payment, within five weeks, of \$748<sup>18</sup>/<sub>100</sub>, and interest from 21st June, 1855. If the payment was not made at the stipulated time the agreement was to be null and void. Johnson could not make the payment. This agreement was not produced, nor was its absence sufficiently accounted for to let in secondary evidence. If it had been proved it would not, in my opinion, have created an estoppel on the plaintiff to set up his title in this suit.

On the 22nd September the Sheriff executed a conveyance of the premises to Davis, pursuant to the sale, reciting that it was made under a pluries writ of *fieri facias*, tested 31st March, 1858, and that the sale took place on the 6th July, 1859. As to this sale, there were objections to the proof offered of a *fi. fa.* against goods and the return thereof:—that it was produced by the defendant's attorney, whereas it should been in the office of the Clerk of the Crown, and ought to have been proved by exemplification; that there was no legal evidence of the judgment: all that was proved was a certificate from the deputy-registrar of the County of Lambton, to the correctness of the copy of an instrument registered in his office on the 22nd June, 1855, which instrument purported to be a certificate from the Clerk of the Crown and Pleas of the Court of Common Pleas, that judgment was entered up between Hiram Cook and Duane M. Cook, plaintiffs, and John Morrison, defendant, on the 21st June, 1855, in an action on promises, for £160 10s. 9d. damages, and £28 6s. 5d. costs.

It was further proved that by deed, dated 25th September, 1859, Davis conveyed to Hector McLean, under whom the defendant claimed title. The consideration stated in this deed was \$1. Hector McLean swore that after getting

this deed Johnson gave him possession under a written agreement between them, which he (McLean) had searched for, but had not found; he supposed he had it; he had it in the fall of 1864. He said he could not find it among his papers, it might have been lost. On this statement the plaintiff's counsel objected to secondary evidence of its contents. The learned Judge agreed in the objection, but received the evidence, that the whole matter might be before the Court. McLean then stated that Johnson and he entered into a written agreement, that upon his paying McLean \$1,200 within a year, McLean would convey the property to him. This was in 1863. Johnson had also the privilege by the agreement of selling the property within twelve months, and that he should have all that should be realized above the \$1,200. McLean said the agreement contained more, that he did not recollect its full contents. It was verbally agreed that if McLean should sell for more than \$1,200 Johnson was still to have the surplus, and McLean was to have the possession and use of the place, and no interest on the \$1,200. The agreement was signed and delivered to him (McLean), and Johnson gave him possession.

I was at a loss to understand how Mr. Davis was induced to convey this land, for which, according to the Sheriff's deed, he had a few days before paid £244 0s. 7d., to McLean for one dollar. Possibly the explanation is to be found in the case of *Morrison v. McLean*, 7 Grant 167, which was cited in the argument, but if so the statement of facts in that case are not in evidence before us, and cannot affect our judgment.

We think the plaintiff made out a title sufficient to entitle him to recover; for, as we have already said, we think the conveyance made by John Morrison to Lionel H. Johnson valid and effectual to pass the estate. Then the Sheriff's sale, admitting all the objections against it to be overruled, cannot have any effect to destroy the title of or transfer the estate vested in Lionel H. Johnson. The defence must rest upon this—that the acts and conduct of

Johnson since that sale prevent his subsequent assignee, the plaintiff, from setting up his legal title, as well as from setting up objections to the Sheriff's sale and conveyance, and the defendant's title derived thereunder.

I have already expressed my opinion that the transaction with Davis could not operate as an estoppel. It passed no interest, and was a conditional arrangement that was never carried into effect. The same may be said in reference to the agreement asserted by McLean; against this, however, there is the further objection that the agreement was not proved. The learned judge only admitted the secondary evidence *sub modo*, expressing his opinion that no sufficient foundation had been laid for its reception. But he left it to us to consider, and we agree with him it ought to have been rejected.

We think the rule should be discharged.

*Rule discharged.*

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### BAIN V. McDONALD.

*Detinue—Leave and License—Revocation—New assignment.*

Detinue for the keys of plaintiff's dwelling house. Plea: leave and license.

Second replication: that before the detention the plaintiff revoked the alleged leave, of which the defendant had notice. Rejoinder: that within a reasonable time after the revocation and notice of it, defendant re-delivered the keys to the plaintiff, who accepted them. *Held*, replication and rejoinder both good.

The word *detained* in a declaration means an adverse detention, and it is unnecessary, therefore, to plead leave and license specially.

Third replication: that defendant, as sheriff, entered the house with the plaintiff's consent, to levy under a *fi. fa.* against the plaintiff's goods, having first obtained the keys for that purpose; and that, in excess of his duty as sheriff, he detained the keys from the plaintiff, and locked him out of his house for several days, whereby the plaintiff suffered the injuries complained of in the declaration. *Held*, replication good, as being in the nature of an informal new assignment.

DEMURRER.—The first count of the declaration was in detinue for the keys of the plaintiff's dwelling house in Goderich, whereby the plaintiff, who was a barrister-at-law practising his profession at Goderich, was put to great an-

noyance and expense in having to board and lodge at an hotel for a long time, and suffered injury and loss to his reputation as a barrister-at-law, and otherwise.

The defendant's second plea was leave and license.

The plaintiff replied to the same, secondly, that before the detention he revoked the alleged leave, of which the defendant had notice.

And, thirdly, that the defendant, as and being sheriff of the county of Huron, and having as such sheriff authority to enter and levy the goods of the plaintiff in the said dwelling house by virtue of a writ of *feri facias* against the plaintiff's goods, entered the dwelling house with the consent of the plaintiff, and made such seizure therein, having first had handed to him by the plaintiff the keys thereof for the purpose of entering therein; and that the defendant, in excess of his duty as sheriff on occasion of the premises, detained the keys from the plaintiff, and locked him out from his dwelling house and kept him so locked out for many days, whereby the plaintiff suffered the injuries complained of in the first count of the declaration.

The defendant rejoined, secondly, to the second replication, that within a reasonable time after the plaintiff revoked the leave and license, and within a reasonable time after the defendant had notice of the revocation, the defendant re-delivered the key to the plaintiff, who then duly accepted and received the same from the defendant.

To the third replication the defendant demurred, alleging, 1. That it was a departure from the first count of the declaration, the count being for the detention of the key, whereas the rejoinder charges an excess not only in detaining the key, but in locking the plaintiff out of his dwelling house and keeping him locked out for many days, which acts are trespasses quite distinct from and independent of the detention of the key, justified by the second plea. The 2nd, 3rd, and 4th objections were to the same effect. 5. That the replication admits the truth of the plea, and does not answer it or displace it, and is in other respects bad in law.



The plaintiff, by way of surrejoinder, demurred to the second rejoinder, on the grounds: 1. That the facts set out in it were no answer to the replication. 2. That it was argumentative. 3. That it was tantamount to a joinder of issue. 4. That it was a departure from the second plea; the matter should have been pleaded as a plea in the first instance. 5. That it travelled out of and was an enlargement of the plea. 6. That it confessed the truth of the replication and did not avoid it. 7. That it was double, and contained two separate traverses. And the plaintiff joined in demurrer to the third replication.

The defendant joined in demurrer to the second rejoinder. And he gave notice of exceptions to be taken to the second replication: 1. That the leave or license could not be revoked, at all events until the defendant, who was a public officer and was acting in the discharge of his duty as such, had allowed to him a reasonable time to do the act for which the license was granted, and which fact was not shewn in the replication. 2: That the replication was no answer, and was bad in substance.

*C. S. Patterson* for the plaintiff. The second replication is in effect a new assignment, for it alleges a revocation of the license *before* the detainer complained of. The rejoinder to it is bad, for it admits a detainer. The third replication is in substance a sufficient pleading, even although there be a separate cause of action mentioned. It is not relied on but for the mere purpose of an excess on the part of defendant.

*S. Richards*, Q. C., contra. The second rejoinder, that defendant restored the keys within a reasonable time after having had notice of the revocation, is equivalent to a plea of non detinet: *Clements v. Flight*, 16 M. & W. 42. The third replication is a departure from the count. It charges an act of trespass in addition to the detention. It does not allege that the plaintiff revoked the license to keep the keys, but, repeating the detainer, it charges that the defendant locked the plaintiff out of his house.

WILSON, J., delivered the judgment of the Court.

The meaning of the word *detained* in the declaration is said to be an *adverse* detention, and a plea that goods alleged to have been detained were deposited with defendant as a pledge for money advanced by him to the plaintiff, and on payment of the money the defendant offered back the goods to the plaintiff, who refused to receive them, was held bad as amounting to non detinet. The meaning of the declaration is, "that the defendant withholds the goods, and prevents the plaintiff from having the possession of them": *Clements v. Flight*, 16 M. & W. 42, 49. That being so, leave and license does not require to be specially pleaded. It certainly is not required to be pleaded in trover, for the declaration imports a *wrongful* conversion: *Young v. Cooper*, 6 Ex. 259, 262; *Whitmore v. Greene*, 13 M. & W. 104, 107. And if the word *detain* import an *adverse* detention, the same rule must apply.

The plea of license, however, has been specially pleaded, though it need not have been.

In answer to that plea the plaintiff says, in the second replication, that *before* the detention he revoked the license, of which the defendant had notice. This he may reply specially, though he need not do so: *Adams v. Andrews*, 15 Q. B. 284. The meaning of it must be, that before the *adverse* detention complained of the license was revoked. If that be true—and by so pleading the parties have elected to put the facts of their case on the record, so that the Court may determine as a matter of law how the rights should be determined between them, as they have a right to do—there is no reason why, if a license be a justification, the revocation of the license before the detention complained of took place should not remove the justification relied upon.

Then the defendant rejoined to this replication, that within a reasonable time after the revocation, and after the defendant had notice thereof, the defendant re-delivered the key to the plaintiff, who accepted and received it.

This rejoinder must be a good answer in law, for unques-

tionably the defendant must be allowed a reasonable time within which to return the property.

In *Wood v. Leadbitter*, 13 M. & W., *Baron Alderson*, at p. 842, says "If the jury were satisfied that notice was given by Lord Eglintoun to the plaintiff, requiring him to quit the ground, and that, before he was forcibly removed by the defendant, *a reasonable time had elapsed, during which he might conveniently have gone away*, then the plaintiff was not, at the time of removal, on the place in question by the leave and license of Lord Eglintoun."

*Cornish v. Stubbs*, L. R. 5 C. P. 334, is to the same effect.

The demurrer with the seven objections to this rejoinder, many of them being only grounds of special demurrer, while special demurrers were in use, need not be further considered.

The defendant's notice of objections to the second replication has no application, as it imports into it facts which are not contained in the replication at all, but are set out in the third replication, with which, in the particular line of pleadings to the second replication, the defendant has nothing whatever to say.

The defendant is entitled to judgment on the demurrer to his second rejoinder.

The third replication and the pleadings to it are still to be considered.

That replication states that the plaintiff handed the keys to the defendant as sheriff, to enable him to enter the house upon the *fieri facias* against the plaintiff's goods, and to seize them; and that the sheriff with the plaintiff's consent did enter and seize. So far it is merely a confirmation of the plea, that the defendant had the keys with the license of the plaintiff. The replication then proceeds, "the defendant in excess of his duty detained the keys from the plaintiff, and locked him out of his house, and kept him so locked out for many days, whereby the plaintiff suffered the injuries complained of in the first count of the declaration."

This shews that the license referred to in the plea was a

license to use the keys to enter the house in order to seize the goods, and that the locking of the house, and locking the plaintiff out of it, and keeping the keys, were acts done in excess of the license granted; and so there was no license to keep the keys or to use them for any other purpose than that for which they were granted, and to which the license extended.

It is in the nature of an informal new assignment, that the plaintiff does not proceed for the detention before the entry into the house, but since the entry, by reason of the defendant having locked up the house, and by implication, though not expressly alleged, taken the keys away, in excess of the license. It is not very formally stated, but it may be so read.

The plaintiff may recover special damages in such an action if they be laid in the declaration, but the locking of the house and locking the plaintiff out of it, which may be intended as reasons redundantly given in the replication why the license was determined, cannot afford grounds of damage by way of amplification to those already stated in the count.

The cases as to the recovery of special damages in detinue are *Williams v. Archer*, 5 C. B. 318; *Crossfield v. Such*, 8 Ex. 159.

We are of opinion that judgment should be for the plaintiff on the demurrer to the third replication.

*Judgment accordingly.*

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## CROSSWAITE V. GAGE.

*Boundary—Estoppel—Agreement to abide by survey.*

In an action of trespass, q. c. f., it appeared that defendant conveyed to the plaintiff 19 acres of lot 2 in the 5th concession of Barton, described by metes and bounds, commencing at the N.E. angle of the lot. This starting point upon the ground was undisputed, and it was admitted that the description given enclosed the land claimed by the plaintiff.

*Held* that defendant was estopped by his deed, and could not set up any question as to the boundary between lots 1 and 2.

It appeared also that about twelve years since one W., defendant's tenant, having moved the fence between plaintiff and defendant, an agreement in writing was entered into between W. and the plaintiff, that they would employ B., a surveyor, to establish the original line between lots 1 and 2, and would be bound by it; and defendant, by a memorandum signed by him at the foot of this agreement, agreed to abide by it. The land in dispute was then in W.'s possession, and it was alleged that B. had not completed his survey.

*Held*, no evidence to support defendant's plea of leave and license.

*Held*, also, that upon the evidence, set out below, B., the surveyor, had proceeded properly to establish the line.

TRESPASS, to part of Lot 2 in the 5th concession of the Township of Barton.

Pleas: 1. Not guilty; 2. Leave and license; 3. Land not the plaintiff's; 4. Statute of Limitations.

The cause was tried before Galt, J., at the Spring Assizes for 1871, at Hamilton, without a jury.

It appeared that the defendant, by deed dated 13th April, 1842, conveyed to the plaintiff 19 acres of lot 2 in the 5th concession of Barton, describing the parcel of land by metes and bounds, commencing at the north-east angle of lot No. 2 (which point of commencement was on the ground undisputed), then north  $72^{\circ}$  west, 8 chains, and 72 links; then south  $18^{\circ}$  west, 21 chains and 79 links, &c., describing a parallelogram.

Mr. Blyth, a surveyor, testified that he ran the line in 1838 for the late Mr. Street, who purchased these 19 acres at Sheriff's sale, before he got his deed from the Sheriff: that he was then instructed to lay off 19 acres of lot 2 in the 5th concession, and the defendant was present, though not then interested: that in June, 1870, he went to survey the land as described in the deed to the plaintiff, and he

took the description in the deed, and followed it on the ground; and he found that the defendant encroached on the plaintiff's land at the north end one chain, and on the south one chain and forty links, making about one acre.

It appeared, also, that the line fence had been moved between plaintiff and defendant about twelve years ago, by one Williamson, a tenant of defendant, and that an agreement under seal was then entered into between the plaintiff and Williamson, in which they agreed "to employ Mr. Blyth (the witness) to establish the original line between lots 1 and 2, said line to remain according to the old survey, and wherever said Blyth establishes the corner it is to remain final between both parties." This agreement was dated 8th July, 1859, and underneath the signatures of plaintiff and defendant was the following: "I, John Gage (defendant), the owner of said land, agree to abide by the corner established by Blyth, according to the above agreement," signed by defendant.

The defendant was examined, and said that Blyth never carried out his survey, and that he, defendant, was ready to carry out the agreement. At this stage of the case it was adjourned for two days, until Mr. Blyth could make a survey in accordance with the terms of the agreement.

When the case was resumed, Mr. Blyth stated he made a survey of the land in dispute in accordance with the agreement, and that he established the line between lots 1 and 2 according to law: that he ran the whole line, starting from the undisputed point in front of the lot in the fifth concession: that he took the general bearing of the township, and that it agreed with the courses given in the deed from defendant to plaintiff, and according to those bearings he had no doubt but that the defendant's fence was on the plaintiff's land; and he stated that the line run by him was according to the old survey: that he examined a Mr. Secord about a stone in front of the sixth concession which was claimed by the defendant as the place of an original post, but the bearing between that stone and the undisputed point, or N.E. angle of lot two, would not

correspond with the bearings of the township: that he had no satisfactory evidence of an undisputed point in the rear of the fifth concession, and that under these circumstances it was his duty to run a line from the undisputed N.E. angle of lot two in the fifth concession, in accordance with the bearings of the township, and in doing this he found that the defendant was on the plaintiff's land.

Evidence was given on the part of the defendant to shew that the stone referred to in front of the sixth concession was put in the place of an original stake; but the witness, Secord, who referred to it, said he remembered a stake 33 years ago, which stood where the stone now is, and which stone he stated was placed there some eight or nine years ago by Mr. Blyth (the latter part being clearly a mistake) He, however, said that he did not know the original stake, or remember any mark on it, and the only information he had about it was derived from a Mr. Ryckman, a surveyor.

Another witness, Davis, was examined as to the original stake, but his evidence was not clear or satisfactory.

The defendant also called Mr. O'Keefe, a surveyor, who testified that on the evidence of the witnesses Secord, Davis, and another, given before him, he assumed the stone in question, placed as indicating the line between lots one and two in the sixth concession, to be a corner stone, and he drew a line from that point across the concession line to the undisputed point in the fifth concession, and that in that case he found the defendant's fence to be on that line, the bearing between those two points being  $24^{\circ} 15'$  S.W., while the township bearing was  $20^{\circ}$ , and that that bearing would bring the line considerably to the west of an undisputed stone or corner between one and two in the seventh concession.

It was contended by the defendant's counsel that the effect of the agreement made between Williamson and the plaintiff entitled defendant to keep possession until Blyth should have made his survey, and that defendant was entitled to a verdict on the plea of leave and license. The learned Judge entertained a different opinion, but he re-

served to defendant leave to move on the point. The plaintiff's counsel contended, that as the starting-point in the plaintiff's deed was established on the ground as an undisputed corner post, and the metes and bounds of plaintiff's 19 acres, commencing from that point, were specifically set out, and were admitted by all parties to enclose the land claimed by the plaintiff, it did not lie in defendant's mouth to dispute these boundaries, and he was estopped from setting up any question of boundary lines between lots one and two.

The learned Judge found in favour of the plaintiff, and 1s. damages, on the ground that both parties agreed to be bound by Mr. Blyth's survey, and he had decided in favour of the plaintiff. He reserved leave to defendant to move to enter a verdict in his favour, if the Court should be of opinion that Blyth pursued a wrong course in making his survey.

In Easter term last, *F. A. Read* obtained a rule *nisi* to enter a verdict for defendant on the leave reserved, on the ground that Blyth, the surveyor, on whose report and evidence the verdict was based, pursued a wrong course in making his survey, and on the ground that the effect of the agreement of 8th July, 1859, between the plaintiff and Williamson, entitled the defendant to hold possession until the survey made by Blyth.

During this term *Sadleir* shewed cause, citing *Davis v. Waddell*, 6 C. P. 442; *Culp v. Culp*, *Ib.*, 466.

*Harrison, Q. C.*, supported the rule.

MORRISON, J.—Since the argument, the learned Judge has been consulted as to what took place on the trial, and he reports that the question of a trespass was not disputed if the plaintiff was entitled to the piece of land in question, it being admitted that the defendant occupied it, and had it within his fence; the only question being, whether the line claimed by the defendant was the true boundary line of the 19 acres conveyed to plaintiff by defendant. The defendant did contend, as appears by the notes, that he was



entitled to keep his fence where it stood until Mr. Blyth determined the line as agreed between the plaintiff and defendant's tenant in 1859, asserting that he was ready to remove it, but that Blyth had not made any survey; and when the learned Judge ruled against him, that the agreement of his tenant afforded the defendant no defence in this action under the plea of leave and license, the defendant stated his willingness to abide by a survey of Mr. Blyth, contending that in the survey made by Blyth in June previous he did not run the lots their whole depth, and so not complete; and the trial was adjourned for two days, to afford time to Blyth to make another and complete survey, which he did, and testified to it, and the course pursued by him in making it; and after hearing his testimony, and the evidence for the defence, the learned Judge found in favor of the plaintiff, on the ground that both parties agreed to be bound by it; the defendant's counsel contending, however, that Blyth did not pursue the proper course in making the survey; and the learned Judge reserved leave to move on that ground.

This point is the first taken in the rule for a new trial, and it seems to us that Blyth, in making his survey, adopted the proper course. The side line in dispute is that between lots one and two in the fifth concession of Barton, that is, the first side line from the boundary line between that township and Saltfleet, and Blyth commenced his line from an undisputed original post between the lots in question in the front of the fifth concession, being the front angle of lot two, on that side from which the lots were numbered, and he ran in the course of the bearings of the township, and parallel to the boundary line of the township, which is the line next to the one in dispute, and in doing this he found that the defendant encroached on the plaintiff's land to the extent in dispute.

I think that it is hardly possible a more satisfactory course could have been pursued. It was also shewn that the starting-point and the lines and courses corresponded with those set out in the defendant's deed to the plaintiff.

The ground upon which the defendant relied was, that at the front angle of lot two in the sixth concession there was a stone monument, which was alleged to stand on the spot where an original post was planted; and—assuming that there was satisfactory evidence that such was the case, but which was denied—that Blyth should have run his line from the undisputed post in front of the fifth concession to this stone in the sixth concession, and in that case the line between the lots in question would be as claimed by defendant. The bearing of such a line would be several degrees to the west of the bearings of the township, and according to defendant's own surveyor would, if carried on, strike a point considerably to the west of another undisputed post, between lots one and two in the front of the seventh (the next) concession, and consequently not agreeing with either of the undisputed posts between the same lots in the front and rear concessions.

I see no reason to doubt that the line run by Mr. Blyth was the correct one, and that he adopted the proper mode to ascertain it.

It further appeared, and was not denied, that taking the starting-point, which was the undisputed point in front of the fifth concession, and the description by metes and bounds on the courses set out in the deed from the defendant to the plaintiff, the plaintiff's 19 acres could be readily and accurately traced on the ground: that Blyth so traced it, and found that defendant's fence was in upon the plaintiff's land to the extent in dispute. On these grounds alone I think the plaintiff was entitled to succeed. Defendant was the owner of the land on both sides of this disputed line at the time he conveyed to the plaintiff the 19 acres as part of lot two, which he described by certain metes and bounds. I do not think it lay in defendant's mouth to say, against his deed, that the land he sold and conveyed to the plaintiff was not the land specifically defined by those metes and bounds.

As to the other point taken in the rule, I think the learned Judge properly ruled that the agreement made

between the plaintiff and Williamson, defendant's tenant, was not evidence for the defendant under the plea of leave and license, whatever evidence it might be in an action against Williamson for the trespass he committed.

Mr. Harrison also contended that a demand of possession ought to have been proved. The learned Judge reports that no such point was mentioned or taken at the trial.

On the whole, we think the verdict should stand, and the rule be discharged.

DRAPER, C. J. OF APPEAL.—I have gone over the evidence carefully with my learned brother, and entirely concur in his judgment.

WILSON, J., concurred.

*Rule discharged.*

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MEMORANDA.

During this Term the following gentlemen were called to the Bar :—

HECTOR MANSFIELD HOWELL, WILLIAM FREDERICK WALKER, HENRY BLEECKER, DUNCAN JOHN MCINTYRE, HENRY H. SMITH, DANIEL MCCRANEY, ALLAN CASSELS, JONATHAN BROWN DIXON, HENRY A. WARD, JOHN WILLIAMSON JONES, JAMES HENRY BURRITT, THOMAS MAITLAND GROVER, HARRY H. HILL, JOHN A. W. HATTON.

# TARIFF OF FEES,

MADE BY THE

## JUDGES OF THE SUPERIOR COURTS

### OF COMMON LAW.

**MICHAELMAS TERM, 1871.**

(35th Victoriæ.)

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*December 9th, 1871.*—The following Rule was read in Court :—

FROM and after the first day of Hilary Term next, the Table of Costs following shall be that according to which all costs in civil actions in the Courts of Queen's Bench and Common Pleas, shall be allowed and taxed, and no other fees, costs, or charges, than herein set down shall be allowed, in respect of the matters thereby provided for, either upon taxation between Attorney and Client, or between Party and Party.

#### TABLE OF COSTS.

General allowance for Plaintiffs and Defendants, as well between Attorney and Client, as between Party and Party, approved by Rule of Court, Michaelmas Term, 35th Victoria, November, 1871.

#### TO THE ATTORNEY.

*Instructions to the Attorney :—*

	\$ cts.
Taking Instructions to Sue or Defend, except in	
Ejectment .....	3 00
In Ejectment.....	4 00



## WRITS.

	\$	cts
Summons including attendance .....	2	00
Concurrent Summons .....	1	50
Renewed Summons .....	1	50
Capias .....	2	00
Concurrent Capias .....	1	50
Renewed Capias .....	1	50
Capias ad Satisfaciendum .....	2	00
Renewed Capias ad Satisfaciendum .....	1	50
Capias ad Satisfaciendum for the Residue .....	2	00
Renewed do. do. ....	1	50
Fieri Facias .....	2	00
Renewed Fieri Facias .....	1	50
Concurrent Fieri Facias .....	1	50
Fieri Facias for the Residue .....	2	00
Renewed do. ....	1	50
Habere Facias Possessionem .....	2	00
Special endorsement of demand on Writ of Summons	1	00
Writ of Revivor .....	2	00
Ejectment (Summons in) .....	2	00
Writ of Trial, drawing, if under Seven Folios .....	1	25
(If above, 10 cents per folio for all above.)		
Writ of Enquiry the same .....		
Subpoena ad Testificandum .....	1	00
Subpoena, Duces Tecum .....	1	25
(and if above four folios, additional, per folio 10 cents)		
Attachment against Goods of absconding debtor ...	2	00
Attachment against Garnishee .....	2	00
Habeas Corpus obtained by plaintiff, including allowance thereof .....	2	00
Procedendo .....	2	00
Venditioni Exponas .....	2	00
Supersedeas .....	1	25
Mandamus .....	2	00
Injunction .....	2	00
Commission to examine witnesses .....	2	00

NOTE.—The above allowances include all charges for attendance for the writ and delivering it to the officer.

**COPY AND SERVICE OF WRITS OF SUMMONS AND  
OTHER PROCESS.**

	\$ cts.
For each copy, including copies of all Notices required to be endorsed.....	1 00
Service of each copy of Writ, if not done by the Sheriff, or an officer employed by him, when taxable to the Attorney.....	0 50
Mileage per mile, for the distance actually and necessarily travelled, when taxable to the Attorney....	0 10

**INSTRUCTIONS FOR PLEADING, &c.**

For Special Affidavits, when allowed by the Master, and instructing Counsel upon special matters.....	1 00
Instruction to Counsel in common matters.....	0 50
Instructions for Pleadings in suit.....	1 50
Do. for Brief.....	2 00
Do. for every Suggestion.....	1 00
Do. for Issue of Fact by consent.....	1 50
Do. for Suggestion to revive, or for suit of Revivor, when no rule necessary.....	1 00
Do. for Rule for Writ of Revivor, when necessary.....	1 00
Do. to defend executor, after suggestion of death of original defendant.....	1 00
Do. for agreement of damages (a) .....	1 00
Do. for confession of action in Ejectment, as to the whole or in part.....	1 00
Do. to strike or reduce a Special Jury.....	2 00

**DRAWING PLEADINGS, &c.**

Declaration.....	2 00
If above ten folios, for every folio above ten, in addition .....	0 20
One or more Pleas, if five folios or under.....	2 00
If above five folios, for every folio in addition .....	0 20
Joinder of Issue, inclusive of copies and engrossing.	0 50
Demurrer.....	1 00

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(a) See C. L. P. A. sec. 155.

	\$ cts.
Joinder of Demurrer, inclusive of copies and engrossing.....	0 50
Marginal statement of matters of Law for argument, exclusive of copies for the Judges.....	1 00
Replications, new Assignment, and other Pleadings, the same as the foregoing charges for Pleas.	
Postea, including engrossing.....	1 00
Judgment, whether by default or final.....	0 50
Authority to receive Moneys out of Court.....	0 50
Suggestions, Pleas to Suggestions, and subsequent Pleadings of three folios or under, inclusive of engrossment.....	0 80
If above three folios, for every folio, drawing and engrossing .....	0 20
Issue for the trial of facts, by agreement, for every folio.....	0 20
Special case, per folio .....	0 20
Drawing interrogatories or answers for any purpose required by Law, including engrossing, per folio.	0 20
Agreement of Damages and copy, if five folios, or under.....	1 00
Above five folios, for every folio, drawing and engrossing.....	0 20
Special particulars of demand or set-off, per folio...	0 20
Short, ditto.....	0 50
Bill of Costs, and copy for taxation.....	1 00
Taking Cognovit and entering Judgment thereon, when there has been no previous proceeding, and the true debt does not exceed \$200.....	8 00
For the same services, when the true debt exceeds \$200.....	12 00
Drawing and engrossing Cognovit and attending execution, where there have been previous proceedings .....	1 00
Replication, accepting money out of Court, in full of demand .....	0 70
Every necessary letter on the business of the cause.	0 50

**COPIES.**

	\$	cts.
Declaration when not exceeding ten folios each.....	1	00
Do. above ten folios, per folio each.....	0	10
Other Pleadings before enumerated, above five folios, per folio each.....	0	10
Issue (Pleadings) if fifteen folios or under.....	1	50
If above fifteen folios, for every folio .....	0	10
All Proceedings, Interrogatories, Answers, and other papers, of which copies are to be delivered, per folio.	0	10
Judgment for non-appearance on Specially Endorsed Writs, or Writs of Revivor and in Ejectment, to be taken as nine folios, including the Writ.		
Of Special and Common Rules.....	0	75
Of Special Rule, above three folios, per folio additional .....	0	20
Of Summons or Order of a Judge .....	0	50
Of Order to charge a prisoner in execution .....	0	70

**NOTICES, INCLUDING COPY.**

To declare, reply, and subsequent proceedings .....	0	50
By Defendant to bring issue to trial .....	0	50
To executor or Administrator of sole Defendant deceased, to appear to writ and suggestion.....	0	50
Of appearance, when appearance duly entered, and notice given on the day of appearance, but not otherwise .....	0	50
Of appearance to Writ of Revivor.....	0	50
To plead.....	0	50
Of declaration, when necessary .....	0	50
Of objection for mis-joinder, or non-joinder of Plaintiff .....	0	50
To Sheriff to discharge a prisoner out of custody ...	0	50
Notice in Ejectment to defend for part of premises..	1	00
If above three folios, for every folio additional.....	0	20
Notice of claimant's or defendant's title in Ejectment, the same fees.		
Notice of admission of right and denial of ouster by a Joint Tenant, &c. ....	0	50



	\$	cts.
If above three folios, for every folio.....	0	20
Of discontinuance by claimant in Ejectment.....	0	50
Of confession of action of Ejectment, as to whole or in part .....	0	50
Of trial or assessment .....	0	50
Demand of residence of Plaintiff and all other common notices.....	0	50
To admit or produce, if not exceeding two folios.....	0	50
For each folio above two .....	0	20

**ATTENDANCES.**

Attendance at Judge's Chambers.....	1	00
Attendance to file or serve .....	0	50
Attendance to give or receive undertaking to appear when service of process accepted by an attorney.	1	00
Attorney attending Court of Assize, when not him- self Counsel or Partner of Counsel .....	2	00
Attendance on Master in special matters .....	1	00
For every hour after the first .....	1	00
Taxation of costs per hour .....	1	00
All other necessary attendances .....	0	50

**BRIEFS.**

For drawing Brief not exceeding five folios .....	2	00
Do. per folio additional of original and necessary matter .....	0	20
Copies of documents, other than Pleadings, when required, per folio .....	0	10
Copy of issue book and brief for second Counsel, when fee taxed to him, per folio .....	0	10

**TERM FEES AND OTHER FEES.**

Term Fee after declaration filed .....	1	00
Fee on every Record, Writ of Trial, or enquiry.....	1	00
Fee on every Rule of Court or Judge's Order.....	1	00
Fee on attending by Counsel or Attorney, to hear Judgment of Court, when attendance is noted by the Clerk at the time.....	2	00

**AFFIDAVITS.**

	\$	cts.
Drawing Affidavit per folio.....	0	20
Copies of Affidavits when necessary, per folio.....	0	10
Common Affidavits of Service, when necessary, or of payment of mileage, including copy and oath.	1	00
Mileage on Services as on Writs of Summons.		

**DEFENDANTS.**

Appearance .....	0	70
For each additional Defendant.....	0	25
A second summons, and order for time to plead, shall be allowed in special cases, when necessary.		

**COUNSEL FEES.**

Fee on Motion of Course, or on Motion for Rule Nisi, or on Motion to make Rule absolute, in matters not special.....	2	00
On Special Motion for Rule Nisi (only one Counsel fee to be taxed).....	5	00
To be increased to \$10 in the discretion of the Master at Toronto, who shall mark amount to be taxed on Rule before taxation.		
To attend Reference to Master, when Counsel neces- sary.....	5	00
On revising Pleadings, or Interrogatories, or set- tling or revising Special Cases when necessary, in the discretion of the Master at Toronto, who shall certify the amount to be taxed, before taxation, when Bill taxed in the country not exceeding....	5	00
Advising on evidence in contested cases, in discre- tion of the Master at Toronto, as above, a sum not exceeding.....	5	00
Fee on argument on supporting or opposing Rules on return of Rule Nisi, or argument of Demurrer, special case or appeal.....	10	00

NOTE—To be increased at the discretion of the Master at Toronto, to a sum not to exceed \$25.00.

	\$	cts.
Fee with Brief on Assessments.....	5	00
Fee with Brief at Trial in cases of Tort or in Ejectment, or in matters of contract, .....	10	00

(When sum to be recovered exceeds \$400, to be increased by taxing officer, in his discretion, to a sum not exceeding \$20 to Senior Counsel, and \$10 Junior Counsel, in actions of a special and important nature; Provided that the Master (at Toronto) shall have power to tax increased fees, provided that more than one Counsel fee shall not be allowed in any case, not of a special and important nature, nor more than two in any case.)

Fee to Counsel on Trial of Issues upon Writ of Trial in the County Court.....	6	00
Fee to Counsel when Counsel attend on argument or examination in Chambers, which in opinion of the Master required attendance of Counsel.....	2	00

(But may be increased in the discretion of the Master to \$10.)

Where any Fee is subject to be increased in the discretion of the Master, either party to the taxation may, during its progress, require that such item shall be referred by the Taxing Officer to the Master of the Court at Toronto, whose decision shall be final.

The Master at Toronto may apply to a Judge or the Court, on the taxation of any item which is in his discretion, or is referred to him.

No application shall be allowed by either Attorney or Counsel to a Judge or the Court, in reference to any item which is in the discretion of the Master; but this is not to prevent an application for revision of taxation.

**ALLOWANCE TO WITNESSES.**

	\$	cts.
To witnesses residing within three miles of the Court House, per diem.....	0	75
To witnesses residing over three miles from the Court House .....	1	00
Barristers and Attorneys, Physicians and Surgeons, when called upon to give evidence in consequence of any professional services rendered by them, or to give professional opinions, per diem .....	4	00

**CLERK IN CHAMBERS.**

For each Fiat granted by a Judge for a writ of Quo Warranto, or for a Rule of Court.....	0	50
For every Summons .....	0	25
For every Order.....	0	50
For filing each paper.....	0	07
Taking Affidavit .....	0	20
For making up each final Judgment of the Judge in contested Municipal Election cases, and returning the same into Court.....	1	00
Copies of papers, per folio of 100 words.....	0	10
Every search of not more than two terms.....	0	10
Do. if exceeding two terms and not more than four.....	0	20
Do. if exceeding four terms, or a general search .....	0	50

**CONTESTED MUNICIPAL ELECTIONS.****Attorney.**

<i>Instructions</i> .—To apply for a Writ of Summons or defend against.....	2	00
<i>Statement</i> of grounds of complaint, including a fair copy .....	2	00
<i>Affidavits</i> whether special or common, per folio of 100 words .....	0	20
<i>Recognizance</i> —Drawing .....	1	00



	\$	cts.
<i>Attendances Special</i> —at Chambers, for Writ of Summons, to serve writ, upon the argument, or to hear judgment .....	1	00
<i>Attendances Common</i> —all other attendances, not mentioned as special, each .....	0	50
<i>Writs</i> .—Preparing Writ of Summons, Writ of Certiorari, Mandamus, Trial, or Writ of Execution, each.	1	00
Fee on each Writ .....	1	00
<i>Notices</i> .—Indorsement on Writ of Summons, every other endorsement upon writ, when required to be made, and all common notices, each.....	0	50
<i>Copies</i> of Statement, or other papers and documents, when required to be made or served, half the amount allowed for the original, and where no specific sum is allowed, then copies of papers required, or which may be directed to be made, furnished or served, to be allowed per folio of 100 words .....	0	10
<i>Issues</i> when directed to be tried, preparing same ...	1	00
<i>Disbursements</i> .—Postages actually paid; mileage when it is necessary to employ parties to serve writs, papers, &c., the actual number of miles travelled to perform the service, per mile .....	0	10
(The Affidavit must state the number of miles actually travelled, and also that the charge has been paid.)		
<i>N. B.</i> —No instructions to be allowed, nor attendances to swear affidavits.		
Instructions for Briefs, as in ordinary cases.		
Briefs, per folio of original matter, when necessary...	0	20
Briefs, per folio of copy, when necessary.....	0	10

#### Counsel.

<i>Fee</i> for argument upon the return of the Writ of Summons, if argued by Counsel .....	10	00
To be increased at the discretion of the Judge, according to the importance of the case, to not exceeding	20	00

**CLERKS OF THE CROWN AND PLEAS AND THEIR  
DEPUTIES.**

*(As per Statute 27 and 28 Vic. ch. 5.)*

	\$ cts.
For taking Recognizance .....	0 50
For signing and sealing each Writ .....	0 30
For each Order or Rule of Court.....	0 50
For filing each paper.....	0 10
Copies of papers, per folio of 100 words .....	0 10

**COMMISSIONER.**

For taking Recognizance .....	0 50
Swearing each Affidavit .....	0 20
Witnesses, Jurors, Sheriff, and other officers, the same fees and allowances as for similar services at Nisi Prius, and in the Courts of Queen's Bench and Common Pleas.	

MICHAELMAS TERM, }  
35th Victoriæ. }

(Signed) WM. B. RICHARDS, C. J.  
 " JOHN H. HAGARTY, C. J., C. P.  
 " JOS. C. MORRISON, J.  
 " ADAM WILSON, J.  
 " JOHN W. GWYNNE, J.  
 " THOMAS GALT, J.

Certified.

ROBERT G. DALTON, C. C. & P., Q. B.  
 M. B. JACKSON, C. C. & P., C. P.

IN HILARY TERM, 1872, 7th February, the Courts of Queen's Bench and Common Pleas made the following rule:—

*“It is ordered, That the operation of the Rule of Court of last Michaelmas Term, respecting the Tariff of Fees, shall be and is hereby postponed until the first day of Easter Term next, on which day the same shall come into force.”*

HILARY TERM, 35 VICTORIA, 1872.

(February 5th to February 17th.)

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*Present :*

THE HON. JOSEPH CURRAN MORRISON, J.

“ “ ADAM WILSON, J. (a)

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DOUGHERTY V. WILLIAMS ET AL.

*Judge expressing his opinion on the evidence—Counsel reading law to jury.*

It is no ground for a new trial that the Judge expressed his opinion strongly upon the evidence in favor of either side.

Counsel may read a reported case to the jury, in order to shew the law, and for that purpose may refer to the facts; but he cannot go into the facts to shew how a former jury treated the same or analogous facts, and thus argue as to what the verdict should be.

THIS was an action for assaulting the plaintiff, and ejecting him from a railway train.

The case was tried at Toronto, before Wilson, J., when a verdict was rendered for the plaintiff for \$25.

*Harrison*, Q. C., for the plaintiff, moved for a rule to shew cause why the verdict for the plaintiff should not be set aside and a new trial had, for misdirection, and for smallness of damages, which smallness of damages was occasioned by the reading to the jury by the counsel for the defendant of the report of *Rogers v. Van Valkenburg*, 20 U. C. R. 220, and for misdirection in permitting the same to be read, and by the charge to the jury of the learned Judge, wherein he said, “Did he go up as agent of the creditors? I think the facts shew most unquestionably that he did;” and again, “I think the fact of shaking hands shews that Cappin’s statement is the true one;” and used other expressions as to the

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(a) RICHARDS, C. J., was absent on leave during this term, owing to illness.



weight of evidence and credibility of the witnesses strongly calculated to make an impression on the jury prejudicial to the plaintiff, which the evidence and circumstances did not entirely warrant, and which ought not, under any circumstances, to have been used by the learned Judge in submitting a case to the jury involving disputed matters of fact of which they were the judges; and did therein and thereby misdirect the jury, and unduly influenced their finding.

WILSON, J.—It is said I expressed my opinion too strongly upon different parts of the evidence, in a manner unfavourable to the plaintiff. It is not said I did so contrary to the evidence, but that I did so in a manner not entirely warranted by the evidence; nor is it said that I did not nevertheless leave all the disputed facts to the jury to pronounce upon.

The objection, fairly considered, is, that I expressed an opinion at all.

This was a case in which the jury were bound to find particular facts, and in which the Judge had a special duty upon the facts so found, if found in a particular way, to direct the verdict to be entered for the defendant. I confess I did not take a favourable view of the plaintiff's conduct or cause in any respect, and I think the verdict, instead of being \$25 for the plaintiff, should plainly have been for the defendants.

The mode of summing up by a Judge cannot be fixed by any determinate rule. In *Taylor on Evidence*, 5th ed, sec. 23, it is said: "Many Judges indeed, and those of the greatest ability, have not confined their observations within these limits, but have boldly given their opinions respecting the matters of fact." And again, "The too common mode of summing up—'Gentlemen, if you think so and so, you will find for the plaintiff, if you think otherwise, you will find for the defendant; gentlemen, the question is for you,'—though sanctioned by the practice of many able but somewhat lazy Judges, and though possibly in accordance with the strict

theory of a trial by jury, is but little calculated to promote the attainment of truth ; and in complicated cases before a petty jury is almost tantamount, if not to a direct denial of justice, at least to a decision of the issue by lot."

In *Ward v. Mason*, 9 Price 291, Wood, B., said : "The Judge may direct the jury on the evidence, according to the opinion which he may have formed."

In *The Attorney General v. Good*, McC. & Y. 286, Hullock, B., said : "The only ground remaining is, that too great effect was given to the evidence in the learned Judge's direction. I apprehend that that would be a new ground for granting another trial, and would open a door to applications for that purpose to an extent incalculable. I am at a loss to know by what rule the precise quantum of force which should be attached by a Judge to a particular piece of evidence on a trial is to be measured."

In *Davidson v. Stanley*, 2 M. & G. 721, Bosanquet, J., during the argument asked, p. 727, "Is a Judge merely to read over his notes, without saying in what manner the case strikes him?"

Tindal, C. J., said : "The whole objection amounts to this—that the opinion of the Judge was delivered in favour of the defendant. I think it is no objection that a Judge lets the jury know the impression which the evidence has made upon his own mind. At all events, the party objecting to such a course should shew that the impression entertained by the Judge was not justified by the evidence."

Bosanquet, J., said : "A Judge has a right to state what impression the evidence has produced on his mind."

See, also, *Simpson v. Clayton*, 2 Bing. N. C. 467.

Many other cases could be added to the same effect, if I had more leisure to search for them. And I am sure that while I stated strongly my own opinion, I submitted to them the whole evidence, and I withdrew nothing from the jury. The expressions contained in the motion paper were most likely used, but they do not shew—excerpted, excised, and culled as they are—what the full effect and spirit of the observations were which were made on these different

points. I made a very full note of my charge to the jury, and I think it contains the substance of all that I said. I do not know properly how, as has been already referred to, it can be said the Judge was or was not *entirely* warranted by the evidence, as to the manner in which he submits the case to the jury.

Then it was said there was a misdirection, in the admission of improper evidence, because the defendant's counsel was permitted to read the case of *Rogers v. Van-Valkenburg*, 20 U. C. R. 220, to shew how the law, in a case which was likened to the present one, was applied, and should be applied to a particular state of facts similar to that which it was argued were proved at the trial.

The case of *Collier v. Simpson*, 5 C. & P. 73, was referred to, in which medical books, stated by a witness to be works of medical authority, were not allowed to be put in and read as evidence; but it was said that the witness might state that these books were of medical authority, and that he founded his judgment on what he stated partly on the authority of these books.

Nothing can be more different from the case in hand than the authority cited against it. The Court unquestionably cannot know *ex cathedra* anything of medicine, or of science, or of foreign law; and the knowledge of these subjects cannot be communicated to or be acquired by the Court by the admission and perusal of books, even of the most standard authority. The Court can receive evidence on and of such matters only by the recognized method of *vivâ voce* sworn witnesses, but these witnesses may refer to and use such books in support of their testimony: *Lord Brougham's* Statesmen of the time of George III., 2nd Ser. 76; *Lord Nelson v. Lord Bridport*, 10 Jur. 871.

Books may be read to prove some merely speculative opinion, or matter of general history: *Darby v. Ouseley*, 1 H. & N. 1; *Taylor on Ev.*, 5th ed., secs. 14, 1585.

In discussing a question of law in the country where the law prevails, and before a Judge who is presumed to be conversant with that law, and who has to decide it, no

witness can be brought forward to testify what the law is. The Judge has judicial knowledge of it, or is presumed to have it. And it is of no consequence whether the proposition of law be stated on the mere word of the counsel, or be read by him from a recognized book of legal authority. Nor is it of any consequence whether that law, verbally or otherwise stated, be urged upon or explained to the jury in the presence of the Judge, or to the Judge alone.

In *Davidson v. Stanley*, 2 M. & G. 721, 725, it is said, "Whereupon Wilde, A. G., without calling witnesses, addressed the jury, and he referred to *Hogg v. Snaith*, 1 Taunt. 347," and a great number of other cases.

In *Power v. Barham*, 7 C. & P. 356, Campbell, A. G., argued to the jury on the case of *Jendwine v. Slade*, 2 Esp. N. P. C. 572, S. C. 4 A. & E. 473. See also *Fairlie v. Denton*, 3 C. & P. 104, note (a); *Burrows v. Unwin*, 3 C. P. 310; *Coward v. Wellington*, 7 C. & P. 531.

I do not think the facts of the case read to the jury, as I stated at the trial, can be gone into for the purpose of shewing how the jury dealt with them on that occasion; and I quite agree with the reporter's note in 3 C. & P. 105, before referred to: "If, on the trial of a case, the defendant's counsel calls no witnesses, but in his address to the jury cites cases, the practice is, for the plaintiff's counsel to observe on the effect of those cases, confining himself to the law, without touching on the facts."

That does not, however, say that the counsel referring to and using the decided cause, may not use and refer to the facts upon which the legal decision is founded, for the purpose of shewing the operation and applicability of the decision. It was so done by Campbell, A. G., in *Power v. Barham*, 7 C. & P. 356, and it is plain that unless it could be done, the law itself could not be understood either by the Court or by the Judge. The facts of the decided case cannot be read to the jury to shew them how a former jury treated the like or analogous facts, for juries may on the same facts, and when testified to by the same witnesses, arrive at very different results, and because one



jury or twenty juries has or have found a verdict one way upon certain testimony, can be no reason why another jury should do so.

But when the object is to shew how on a certain state of facts the law has been applied, a jury may be reasoned with by counsel, that if they find the facts of the case before them similar in effect to those which existed in the case referred to, then by law their finding should be in the manner contended for. That is just what the Judge himself in his direction to the jury is in the habit of telling them, and that which he ought to tell them.

In *Burrows v. Unwin*, 3 C. & P. 310, the jury wanted to ascertain for themselves what the law was, for "they sent a message to his Lordship" (Lord Tenterden), "desiring to have *Selwyn's* law of *Nisi Prius* sent them from the library of the Court;" but for the sake of precedent, though neither counsel objected to it, the Chief Justice would not send the book, as the proper way was "for the jury to come into Court and state their question, and receive the law from the Court."

No doubt that work must have been used by one side or the other, in addressing the jury before they had retired.

It is every day's practice to read the law, and it must be allowable to read the facts also on which the law is based, from books of legal authority, because I have no doubt the reason is, that a witness cannot be called upon to testify what our own law is upon any particular case or question. The Judge knows that himself, or is presumed to know it, and the counsel respectively assert it as they contend it is, subject to the ruling of the Judge, and either counsel or Judge may use the statement of the law as it is given in statutes or in decided cases for reference and convenience, as containing the rule of law for the occasion.

There is no analogy whatever in using law works of authority, and using other professional or scientific works, in a Court of Law. The Judge, in the one case, with authority pronounces the statement of the law as read to be law or not to be law, as he may determine, and it is *his*

decision which is law ; the books are used as auxiliary aids only. But in the other case the Judge can pronounce authoritatively nothing as to medicine, or science, or foreign law. The books in such cases would therefore, if admitted, be put in the place of both witness and Judge ; and who, it may be asked, knows that the authors of these books are right, or true, or sound, or that there are not other books, or the views of other persons, opposed to them ?

In the present case the defendants' counsel perhaps may have read a little that might not have been strictly admissible, but it cannot be viewed in any other light, if he did so, than as if so much improper evidence had been given in its stead, in which case the verdict would not be disturbed unless it were quite plain the jury had been influenced or misled by it ; and I have no idea that they were so. Here, too, the objection is not that too much of the report was read, or some particular of it which should not have been read, but that a law book or a report of a legal decision was used by counsel in his address to the jury ; and such an objection is unquestionably not in any way sustainable.

In my opinion the finding should have been for the defendants ; and the best evidence that the jury were not led away by the reported case read to them is, that in that case the jury found for the defendant, while the jury found just the opposite way in this case.

By no jury and under no circumstances should the plaintiff, if he recover at all, ever recover greater damages than he has now obtained.

MORRISON, J., concurred.

*Rule refused.*

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## THE TRUST AND LOAN COMPANY V. COVERT AND RUTTAN.

*Deed—Escrow—Estoppel.*

To a declaration on a covenant for quiet enjoyment in a mortgage to the plaintiffs executed by T., the defendants' grantee, one defendant pleaded that T. did not, after the making of that deed, convey to the plaintiffs.

The deed from defendants to T. was dated 22nd June, and the mortgage from T. to the plaintiffs was dated 10th April, 1855. Both were registered on the 28th July; the deed first. It appeared that there were two mortgages from T. to the plaintiffs, on another lot, when this mortgage was made, and instead of which it was given. After executing this mortgage T. found that a deed from defendants to him was necessary to give him the legal title, and he got the deed in question. The two mortgages were not discharged until the 16th August.

*Held*, that the whole transaction shewed that the mortgage was not intended to take effect until the perfecting of T.'s title and the discharge of the other mortgages for which it was given, and that the plaintiffs therefore could recover.

*Held* also, that if the mortgage had been delivered before the deed, the defendants could not have been liable on the ground of estoppel, for the estoppel would apply to T. only, not to defendants.

ACTION for breach of covenant for quiet enjoyment.

The declaration and pleadings are reported in 30 U. C. R. 239, when judgment was given on demurrer.

The defendant Ruttan pleaded three pleas: 1. That the deed alleged to have been made by the defendants to Thompson was not the deed of Ruttan. 2. That Thompson did not, after the making of the deed, convey the land to the plaintiffs. 3. That since action the plaintiffs by deed conveyed the land to J. C. and J. B. M., their heirs and assigns, and that J. C. and J. B. M. were seised of the land in fee.

The plaintiffs joined issue on the first and second pleas, and replied to the third.

The defendant Ruttan demurred to the replication to his third plea, on which judgment was given for the plaintiffs.

The defendant Covert pleaded a plea, which was demurred to, and on which judgment was given for the plaintiffs.

The two issues which remained to be tried were the issues on the first and second pleas of Ruttan.

The cause was tried before Galt, J., at Cobourg, in the Fall of 1870, without a jury.

The evidence was as follows: The deed from defendants to Thompson, dated 22nd June, 1855, and a mortgage in fee from Thompson to the plaintiffs, dated the 10th of April, 1855, on the same land, were put in and admitted. The deed was registered on the 28th July, 1855, and was numbered 836.

The mortgage was registered on the same day, and numbered 837.

The principal money expressed to have been advanced on the mortgage by the company, was \$1,800. The practice of the company was, not to pay the money until the mortgage had been returned registered. The money was paid on Thompson's order, which the company always required to be given before paying it over. The order which was given was dated on the 7th of August, 1855.

The interest due was.....	\$2,232 00
Premiums of Insurance were .....	123 70
Different sums paid for costs on account of litigation.....	507 94
Thompson paid on account....	\$240 70
And the Co. received for rent.	250 75
	<hr/>
	\$491 45

The lot, number 6, in the 9th concession of Hamilton, was said to be worth \$35 an acre.

That was the case for the plaintiffs.

It was contended by the defendants' counsel, that as the mortgage from Thompson to the plaintiffs was made before the deed was given by the defendants to Thompson, the covenant of the defendants to Thompson for quiet enjoyment did not pass to the plaintiffs.

It was answered, for the plaintiffs, that the evidence shewed that the mortgage, although dated before the deed, was not delivered to the plaintiffs till after the deed.

For the defence, Henry H. Thompson was called. He said: "I am the mortgagor. This mortgage was made in substitution of two mortgages, on lot number five,



which previously existed. No money passed on the execution by me of the mortgage to the plaintiffs. The two mortgages on lot five were discharged after the completion of this one. After my application, I think in January, 1855, I was directed to apply to the commissioners for a transfer of the mortgage from lot five to lot six. In April the mortgage was executed. I was not aware that any thing further to be done was required at that time. The deed from Covert and Ruttan transferred lot six out of trust to me. It was some weeks afterwards that I found this was necessary. Mr. George Boulton was the agent of the Trust and Loan Company at that time. Mr. Edward Boulton was a clerk in his office. I am not sure I was present when the deed from defendants to me was executed. I suppose I heard from Mr. McDonell that this deed was necessary. I knew lot six was in the trust. I placed the matter in Mr. McDonell's hands. The signature to the order for payment of the money is in my writing. I think the date is not. I cannot say when the mortgage was signed. \* \* The power of attorney under which the trust was created was in the possession of the plaintiffs since 1853."

This closed the evidence.

The learned Judge thereupon noted: "I find that the mortgage was executed before the deed, and find the second issue on the plea of the defendant Ruttan for Ruttan, and I find the first issue on the plea of Ruttan for the plaintiffs."

In Michaelmas term, 1870, *Hector Cameron* obtained a rule calling on the defendants to shew cause why the verdict on the second issue aforesaid, found for the defendant Ruttan, should not be set aside, and a verdict be entered for the plaintiffs, for such sum as the Court might think proper, against both defendants, on the ground that the date of the execution of the deed sued on was immaterial, and that on the evidence it appeared that the mortgage was not accepted by the plaintiffs until after the execution of the deed by the defendants, and the execution and delivery of the mortgage were not complete until then; or

why judgment *non obstante veredicto* on the said second issue should not be entered, inasmuch as it is immaterial whether the mortgage was executed before the deed, as the plaintiffs were in either event entitled to the benefit of the covenant in the deed ; or why a new trial should not be granted, on the ground of misdirection of the learned Judge, in ruling that the date of the execution of the deed was material, for that the evidence shewed the mortgage to have been executed before the deed.

In Hilary Term last *Armour*, Q. C., and *C. S. Patterson* shewed cause. After the mortgage was made to the plaintiffs by Thompson, it was discovered the legal estate was in defendants ; and a deed was then procured from defendants to Thompson, on which the present action is brought. The plaintiffs entered into possession and took the rents. Thompson's children, by their next friend, afterwards filed a bill in Chancery against their father, the mortgagor, and their mother, and the present plaintiffs and defendants, and some others, to have it declared that a deed made by the defendant Covert to Thompson of lots numbers six and seven, dated 14th of February, 1853, was a deed made to Thompson in trust for his wife and for the issue of their marriage ; and that all the other parties to the bill who, after that, obtained conveyances of the said lands or any part thereof received the same upon the same trusts ; and the Court afterwards decided as prayed, and directed that the defendants in the bill, excepting Thompson's wife, should execute a conveyance of the said lands to persons to be named trustees for the wife and children of Thompson ; and which conveyance the plaintiffs in this suit executed accordingly after the commencement of this suit, as in the third plea of Ruttan mentioned.

The question is on Ruttan's second plea. The declaration alleges that after the making by the defendants of their deed to Thompson, Thompson conveyed and mortgaged the land to the plaintiffs ; and the defendant Ruttan has traversed that by his second plea, and on the issue joined it has been found for the defendant Ruttan. The

breach is, that Thompson had not a good title when he made the mortgage, and the defendants are liable for it; but, on the facts, no legal title ever passed to the plaintiffs, as it appears Thompson had not the legal estate when he made the mortgage, and so the covenants in the defendants' deed to Thompson made after the mortgage never passed to the plaintiffs, because they never got the title or legal estate; and covenant will not lie on a title by estoppel: *Doe dem. Irvine v. Webster*, 2 U. C. R. 224; *Bensley v. Burdon*, 2 S. & St. 524; *Right dem. Jefferys v. Bucknell*, 2 B. & Ad. 278; *Stackpoole v. Stackpoole*, 4 Dr. & War. 320, S. C. 2 Con. & Law. 489. No estoppel arose here, because some interest passed by Thompson's mortgage to the plaintiffs. He was in possession of the land, claiming title in himself: *James v. McGibney*, 24 U. C. R. 155. The following cases shew that after Thompson got the deed from defendants, the plaintiffs could have compelled him to make a new conveyance of the land to them, if he had held the beneficial interest in it, which establishes that the plaintiff's title without such a conveyance was not an estoppel, and did not operate by estoppel against Thompson: *Jones v. Kearney*, 1 Dr. & War. 159; *Smith v. Baker*, 1 Y. & C. C. C. 223; *Carne v. Mitchell*, 10 Jur. 909. They also referred to *Boulter v. Hamilton*, 15 C. P. 125; *McLean v. Laidlaw*, 2 U. C. R. 222. The motion for judgment *non obstante* cannot succeed, because the plea is a traverse of a material allegation, without which the plaintiffs would have had no right to sue on the covenant. The defendants are not bound by the estoppel between plaintiffs and Thompson: *Cuthbertson v. Irving*, 4 H. & N. 742, S. C. in Ex. Ch. 6 H. & N. 135. No authority can be shewn that defendants are estopped. They do not claim under Thompson or under the plaintiffs: *Rawle on Covenants*, 445. If the plaintiffs intended to have relied on the legal effect of the deed to Thompson being the same as if (contrary to the fact) it had been made before the mortgage to the plaintiffs, they should have replied the estoppel. Not having done so the matter of fact was left at large, and has been found against the

plaintiffs. But as some interest passed by Thompson's mortgage, there can be no estoppel: *James v. McGibney*, 24 U. C. R. 155; *Spencer's case*, 1 Smith L. C. 64; *Phillips v. Long*, 9 C. P. 341; *Clemow v. Geach*, L. R. 6 Ch. App. 147.

*Hector Cameron* and *Moss* supported the rule. The learned Judge should have found that the plaintiffs did not accept the mortgage from Thompson until after the deed was made by defendant to Thompson. The evidence shews that was so. The money was not paid by the plaintiffs to Thompson till after the making of the deed to him by defendants, and his mortgage title was not taken as sufficient till the deed was made by defendants; and it was not intended by either of the parties to it that it should be taken until then. The registration is some evidence of that fact, for the latest made instrument, the deed, is registered first, as number 836, and the mortgage, the earliest made instrument, is registered after the deed as number 837; and the money lent by the plaintiffs was not paid until about three weeks after the registrations. A deed may be an escrow till after registration: *Parker v. Hill*, 8 Metc. 447. See also, on this part of case, *Cruik. Dig. Tit. Deed*, vol. iv. ch. 2, sec. 64; *Doe dem. Garmons v. Knight*, 5 B. & C. 671; *Montreal Bank v. Baker*, 9 Grant 100; *Xenos v. Wickham*, L. R. 2 H. L. 296; *Shep. Touch.* 54, 57. The subsequent conveyance of interest converted the prior title by estoppel into an estate by interest. It is of little consequence whether the motion *non obstante* succeed or not, for the whole case is open to the Court, under the Law Reform Act.

If Thompson be estopped, the defendants who conveyed to him are estopped also. The effect of their conveyance to him was that they conveyed to the plaintiffs, who had his title, and the defendants' covenant enured to the plaintiffs: *Cuthbertson v. Irving*, before cited; *Walton v. Waterhouse*, 2 Saund. 418, note (a); *Boulter v. Hamilton*, 15 C. P. 125; *Webb v. Austin*, 7 M. & G. 701; *Sturgeon v. Wingfield*, 15 M. & W. 224; *McKenzie v. City of Lexington*, 4 Dana 129; *Brown v. McCormick*, 6 Watts Penn. R. 610; *Doe dem. Hennessy v. Myers*, 2 O. S. 424.



WILSON, J.—The first question is a matter of fact—whether the mortgage by Thompson to the plaintiffs, although executed before the deed to Thompson from the defendants, was delivered as a deed by Thompson to the plaintiffs before or after he got the conveyance from the defendants.

The second is a matter of law—whether, if the defendants' deed were subsequent to the mortgage, the plaintiffs can, under the mortgage, maintain this action against the defendants.

As to the first question: There were two mortgages from Thompson to the plaintiffs upon lot number five in the same concession and township, subsisting at the time when the mortgage in question, dated the 10th of April, 1855, was given. The mortgage in question was given in lieu and in satisfaction of the other two mortgages. No money whatever passed when the present mortgage was given. Some weeks after Thompson gave the last mortgage he said he found it was necessary, as I understand his evidence, to get the title to lot number six out of the trust:—that is, that Covert and Ruttan, the defendants, in whom the legal estate was, should make a deed to him of number six; and the two mortgages on number five were discharged after the completion of the present mortgage. The discharges were produced; they are each dated on the 16th of August, 1855, after the giving of the deed.

Although Thompson executed the mortgage in April, in order to have the other two mortgages discharged, it was, from the evidence and from the transaction itself, to take effect upon the giving of the consideration on which it was founded. The plaintiffs have their office in Kingston. The business with Thompson in preparing the new mortgage was carried on by the plaintiffs' agent, Mr. Boulton, at Cobourg, where or near to which Thompson lived and the land is situate.

It is not unreasonable to hold that the mortgage, although perfected in form, was not absolutely delivered or accepted until the title to the land offered in substitution of the

other mortgages was found satisfactory, and until those mortgages were acquitted as satisfied. The facts all support that conclusion. The mortgage offered was not taken or acted on. A deed from the defendants was required; that deed was given. Then the transaction went on; the prior mortgages were discharged, and the deed and new mortgage were thereupon registered, not in the order of their date, but in the order of their operation. The case of *Parker v. Hill*, 8 Metc. R. 447, shews that delivery may be after the deed has been registered. It is not necessary here to go so far.

The plaintiffs might have disclaimed the title, if they would not and did not accept it, after they had taken time to advise whether it would be safe to take it or not; *Nicloson v. Wordsworth*, 2 Swanst. 365; *Shep. Touch.* 284, 285.

In *Townson v. Tickell*, 3 B. & Al. 31, Abbott, C. J., said: "The law certainly is not so absurd as to force a man to take an estate against his will"; and he quoted the saying of Ventris, J., in *Thomson v. Leach*, 2 Ventris 198, that a man "cannot have an estate put into him in spite of his teeth." See also *Butler v. Baker*, 3 Co. 26 b.

In *Xenos v. Wickham*, 13 C. B. N. S. 391, Willes, J. said: "When any instrument, whether a formal deed or any other written contract, is executed and handed by the maker to the other party, *primâ facie* that is a delivery, and the estate, or right of action, or other thing thereby legally granted or created, passes to the grantee. But all that is on the assumption that the grantee accepts the delivery and accepts the benefit, which he is presumed to do." And he refers to the authorities before mentioned.

In the same case in the House of Lords, L. R. 2 H. L. 311, Blackburn, J., said: "Was the policy really in fact intended by both sides to be finally executed and binding from the time when the Directors of the defendant's Company affixed their seals to it and left it in their office; or was it, in fact, intended that the assured or their brokers should exercise a subsequent discretion as to whether they would accept it or not? If I thought that the parties did not

in fact intend it to be then finally binding, I do not think there would be any magic in the law to make it binding contrary to their intention." See also p. 312, and what is said by Willes, J., at p. 315, 316.

The whole of that case is a decision that although the deed, a policy of insurance, was in the hands of the agents of the insured, it was nevertheless more a question of fact than of law whether the deed was a perfect deed or not.

If the plaintiffs could, on the receipt of the mortgage, have disclaimed it and the estate assumed to have been conveyed by it, I cannot understand why they might not have said when they got it, "Leave it with us. We will look it over, and tell you whether we will take it or not;" or, "Let us enquire into the title first, and ascertain the value of the land; but recollect, we will not and do not accept the mortgage at present. If you will do that you may leave it; if not, we shall have nothing to say to it, and you can take it away at once." Could it be said they had accepted the estate, or that there was any delivery binding on them in law?

The case of *Thomson v. Leach*, 2 Ventris 198, is very important, in this view, to be considered.

The next question is, assuming the delivery of the mortgage to have been made in April, can it be said the deed, which was made in June, was made before the mortgage?

The doctrine that a title by estoppel will be fed by the subsequently acquired interest is quite right, and as respects Thompson he may be said to have passed the interest by his mortgage, because the subsequent deed to him related to and operated on the previous conveyance by estoppel: *Bac. Ab. Leases*, O; *Webb v. Austin*, 7 M. & G. 701. But can it be said that the defendants are to be affected in the like way?

The legal estate was in fact in them at and after the making of the mortgage, and until they conveyed it to Thompson some months afterward. There can be no reason why, to their prejudice, there should be any relation.

The doctrine of relation, it is said, will never be allowed, if possible, to operate to the prejudice of third persons: Vin. Abr. "Faits." M. N. O.; *Thomson v. Leach*, 2 Ventr. 198; *Shep. Touch.* 59. It is only from necessity and for the purposes of title there is any relation: *Shep. Touch.* 59. And for some purposes it will have relation, and for others it will not.

In *Butler v. Baker*, 3 Co. 27*b* to 30*a*, and 35*b*, 36*a*, the doctrine of relation is largely treated of. It is said, in 29*a*, "If a man make a feoffment, \* \* and long time after the livery the tenant attorns to the feoffee, in this case the attornment, for necessity, and *ut res magis valeat*, shall have relation by fiction of law to pass *ab initio*, for otherwise it can never pass. \* \* But yet this relation shall not charge the tenants for the arrearages in the meantime."

Now it is impossible that the plaintiffs should, by the mere fact of the doctrine of *relation*, after the execution of the deed by the defendants in June, have any right or power to treat them as trespassers at a time before that deed, and after the plaintiffs became mortgagees.

So if the defendants had the day before they made their deed acquired their own title to the land, it would be impossible to hold them liable as covenantors for title from a day anterior to the acquisition of their own title, simply because their grantee's interest had relation to a prior deed he had made when he had no estate in the land.

All the cases referred to which shew that the grantor who is estopped by his conveyance to A. when he had no title, his second grantee after an interest acquired is also bound, and cannot dispute A's. title, because such second grantee claims under the grantor who is bound, have no application here, for the defendants made no deed on which such a question can arise. The estoppel concerns only Thompson, and not the defendants.

I do not see what remedy the plaintiffs can have against the defendants on their covenant with Thompson, made subsequent to the deed and covenant to, and with, and upon which the plaintiffs' title accrued.



There is therefore great reason and force in the rule in Equity, which it was argued prevailed there, that one who passes an estate by estoppel should be bound to make another conveyance after his estate in interest has been acquired. In that way there can be no doubt that the benefit of the covenants made with him, after his first deed of estoppel, will thus pass to the grantee of the land. That has not been done, and if the case turned only on that question, we should decide it in favour of the defendants.

But, as before stated, we think the whole dealing, circumstances and facts, shew that the mortgage made by Thompson was not a perfect instrument, and was not intended to have been until after the perfection of Thompson's title, and its acceptance by the plaintiffs; and upon that ground we think the plaintiffs are entitled to recover.

The rule should therefore be absolute to enter the verdict for the plaintiffs; but no damages were assessed, and there will therefore be a new trial without costs.

*Rule absolute.*

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## MOORE V. GIDLEY.

*C. S. U. C. ch. 19, sec. 198—Notice of action—Attachment--Neglect to file affidavit.*

A notice of action in trespass under the Division Courts Act, Consol. Stat. U. C. ch. 19, sec. 193, *Held*, insufficient, for not stating the time and place of the alleged trespass.

There is no substantial difference in this respect between the form of notice required under that act, and under Consol. Stat. U. C. ch. 126.

Defendant, a Justice of the Peace, issued a warrant of attachment under the Division Courts Act, sec. 199 : *Held*, that it was unnecessary, in order to give defendant jurisdiction, that the affidavit should be filed with the Clerk, though his neglect to do so might be a breach of duty.

TRESPASS, for seizing and taking a gig of the plaintiff's.

Plea: not guilty, by statute, Consol. Stat. U. C., ch. 19, secs. 1 to 220, and ch. 126, secs. 1 to 20, inclusive.

The case was tried at Goderich, before Gwynne, J., at the Fall Assizes, 1871.

It appeared that the defendant was a Justice of the Peace for the County of Huron; and that he issued a warrant, which was proved at the trial, as follows :

“ CANADA,  
PROVINCE OF ONTARIO, { To George Sharp, constable of the County  
County of Huron. { of Huron.

You are hereby commanded to attach, seize, take and safely keep all the personal estate and effects of Doctor E. Moore, a removing debtor, of what nature or kind soever liable to seizure under execution for debt within the County of Huron, or a sufficient portion thereof to secure John Trevithick for the sum of eight dollars, together with the costs of his suit thereupon, and to return this warrant, with what you shall have taken thereupon, to the Clerk of the fourth Division Court of the County aforesaid, forthwith. And herein fail not. Witness my hand and seal, the 19th day of January, A.D. 1870.

THOMAS GIDLEY J. P.” [L. S.]

This warrant was returned to the Clerk of the Division Court by constable Sharpe on the 21st January, 1870, with a return thereon of “seized on the within warrant one gig.” There was no affidavit filed with the Clerk upon which the warrant issued.

A notice of action was put in, served on the 11th June, 1870, as follows: “To Thomas Gidley, of the village of Exeter, in the County of Huron, one of Her Majesty's Justices of the Peace in and for the said County. I do

hereby, as the attorney for and on behalf of Robert Charles Moore, of the village of Zurich, in the Township of Hay, in the county of Huron, Doctor in Medicine, according to the form of the statute in such case made and provided, give you notice that the said Robert Charles Moore will, at or soon after the expiration of one calendar month from the time of your being served with this notice, cause a writ of summons to be issued out of the Court of Queen's Bench against you, the said Thomas Gidley, at the suit of the said Robert Charles Moore; for that you, the said Thomas Gidley, wrongfully seized and took away a certain gig of and belonging to the said Robert Charles Moore." The notice proceeded: and for that the said Thomas Gidley, being a Justice of the Peace in and for the County of Huron, upon the application of one John Trevithick, alleging himself to be a creditor of the said Robert Charles Moore, took the affidavit of the said John Trevithick, pursuant to the 199th and 200th sections of the Division Courts Act, for the purpose of issuing a warrant of attachment," &c., pursuant to section 200, and thereupon issued such warrant, under which the plaintiff's goods were seized, &c.; and that, contrary to the defendant's duty, he did not forthwith transmit the affidavit to the Clerk of the Division Court, but omitted to do so for a long and unreasonable time, whereby the plaintiff, who was not an absconding debtor within the meaning of the Act, was prevented and delayed from setting aside the attachment, and from having his goods and chattels restored to him, &c. The notice was signed by the attorney for the plaintiff, and had endorsed the usual notice.

The plaintiff proved that his gig was seized by Sharp, the constable, under the defendant's warrant.

On the part of the defence, it was submitted the plaintiff should be nonsuited, as it was shewn that the defendant as a Justice of the Peace issued the warrant under the provisions of the Division Courts Act, and that the notice of action was insufficient, in not stating time or place: that

under the provisions of secs. 199 and 200 of the Act, the defendant had jurisdiction as a Justice of the Peace to issue the warrant, and therefore it must be alleged that he acted maliciously, and without reasonable and probable cause.

The plaintiff's counsel contended that defendant was not entitled to notice at all, and if entitled, that the notice was sufficient under Consol. Stat. U. C. ch. 126, sec. 10.

The learned Judge thought he must yield to the objections made by the defendant, and the plaintiff's counsel in deference to that opinion submitted to a nonsuit.

In Michaelmas Term last *Harrison*, Q. C., obtained a rule *nisi* to set aside the nonsuit, and for a new trial, for misdirection of the learned Judge, in ruling that the notice of action was insufficient, and that trespass would not lie under the facts proved at the trial.

During this term *Richards*, Q. C., shewed cause, citing *Parkyn v. Staples*, 19 C. P. 240, as in point to shew the notice of action insufficient.

*Harrison*, Q. C., supported the rule, and cited *Martins v. Upcher*, 3 Q. B. 662; *McPhatter v. Leslie*, 23 U. C. R. 573.

MORRISON, J.—Upon the ground of the insufficiency of the notice we are of opinion this rule should be discharged.

The defendant was acting as a Justice of the Peace in a matter over which he had jurisdiction, under the provisions of section 200 of the Division Courts Act, Consol. Stat. U. C., ch. 19, and was consequently entitled to a notice of action.

The fact that no affidavit could be found in the Clerk's office does not shew that the defendant was acting without jurisdiction. The 200th section authorizes the taking of the affidavit in the preceding section by the Justice, and upon the same being filed with him, the Justice, he may issue the warrant the defendant issued in this case. It was therefore not necessary to give the defendant jurisdiction that the affidavit should be filed with the Clerk, although



it might be a breach of his duty if he did not afterwards transmit it to the Clerk's office.

The case of *Parkyn v. Staples*, 19 C. P. 240, is a direct authority supporting the ruling of the learned Judge at the trial, that the notice was insufficient for not stating time and place of the trespass complained of.

Mr. Harrison contended, from the language used in the 193rd section of the Division Courts Act, that the notice was sufficient: that the section did not require the strictness and particularity which the statute 24 Geo. II., ch. 44 required, and upon which *Martins v. Upcher*, 3 Q. B. 662, was decided, that statute requiring that in the notice there "shall be clearly and explicitly contained the cause of action,"—similar words being used in our Act for the protection of Justices of the Peace, Consol. Stat. U. C. ch. 126, sec. 10—while section 193 of the Division Courts Act, under which the notice in this case was given, only requires that notice "of such action and of the cause thereof" shall be given to the party.

In *Breese v. Jerdein et al.*, 4 Q. B. 585, the notice was under 10 Geo. IV. ch. 44, sec. 41, which provides, that in the case of actions against any person for anything done in pursuance of that Act, notice in writing "of such action and of the cause thereof" shall be given to the defendant one calendar month before, &c.,—the very words used in the Division Courts Act. The Court held there the notice insufficient for omitting to state time and place; Lord Denman, in giving judgment, saying, "The language of the 10 Geo. IV. and 24 Geo. II." (which is similar to our Consol. Stat. U. C. ch. 126), "is not precisely the same, but we think the meaning is substantially the same, and that the same effect must be given to both." That case is a direct authority, and the rule is therefore discharged.

WILSON, J., concurred.

*Rule discharged.*

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## LIZARS AND MCFARLANE V. DAWSON.

*Costs of suits—Action for—Statute of Limitations.*

The plaintiff's attorney sued in 1870 for bills of costs in suits brought for the defendant, in which suits judgment was entered, respectively, in 1860 and 1861, and executions, which were issued in 1863, had been renewed yearly, at defendant's request, until 1870.

*Held*, that the plaintiffs could not recover for any costs incurred before and in the entry of the judgments; for they were entitled on the recovery of judgment to sue for their bill, and were barred by the statute, which then began to run.

*Harris v. Quine*, L. R. 4 Q. B. 657, distinguished.

ACTION on the common counts, for work done as solicitors, &c.

Pleas : never indebted, and Statute of Limitations.

The cause was tried at the Spring Assizes, 1871, at Stratford, before Hagarty, C. J., C. P., without a jury.

It appeared that this action was commenced on the 16th August, 1870, and was brought to recover the amount of two bills of costs incurred in two suits brought by the plaintiffs for the defendant against one Gregory and another.

Mr. McFarlane, one of the plaintiffs, was examined. He stated that he and the present Judge of the County Court of Perth were retained by the defendant to prosecute the suits; and that judgments were recovered in the suits, one in February, 1860, and the other in February, 1861. It appeared that *fi. fas.* against lands were issued on these judgments at the request of defendant on the 17th August, 1863, and were renewed yearly, also at defendant's request, since then until the 16th August, 1870, for the purposes of some Chancery suit. Mr. Lizars, the attorney on the record, and in whose name the first *fi. fa.* lands was issued, was appointed County Court Judge on the 20th August, 1864. No payment was ever made.

It was objected that the charges in the suits after judgment were separate transactions, and that the plaintiffs were not entitled to recover for anything since the judgments.

The learned Chief Justice, upon the authority of *Harris v. Quine*, L. R. 4 Q. B. 653, entered a verdict for the plaintiffs for \$235.65, with leave to defendant to move.

In Easter Term following *Ferguson* obtained a rule *nisi* to enter a nonsuit or verdict for defendant, or to reduce the verdict to the amount of the costs incurred within six years.

During this term *Francis* shewed cause, citing *Harris v. Quine*, L. R. 4 Q. B. 653; *Whitehead v. Lord*, 7 Ex. 691; *Harris v. Osbourn*, 2 C. & M. 629; *Darling v. Weller*, 22 U. C. R. 363.

*Ferguson* supported the rule.

MORRISON, J.—In this case, it seems to me that the plaintiffs are not entitled to recover for any of the costs incurred in the obtaining of the two judgments. These judgments were recovered nine and ten years before the commencement of this action. It is quite clear from the authorities that the conduct of a suit by an attorney is an entire contract, and when judgment is recovered the contract is performed, and the attorney is entitled to bring his action to recover his costs, and the statute begins to run.

The case of *Harris v. Quine*, L. R. 4 Q. B. 653, was relied on by the plaintiffs, as shewing that they were entitled to recover, as they had within the six years issued executions upon the judgments for the defendant. We do not think that case is an authority for the plaintiffs. There a judgment was recovered, but an appeal was brought, and the same attorneys continued to conduct the suit (in appeal); and what the Court held there was, that the suit in appeal was a continuation of the original suit, and the judgment in the latter, which was *primâ facie* a termination of the contract on the part of the attorney, by the appeal ceased to be so. As said by Lush, J., "The conduct of the suit on appeal is but a continuation of the original contract to conduct the suit *ad finem*." Here the suits were con-

ducted to an end over nine years before this action was brought. The issuing of executions was a new duty, and quite independent of the termination of the suit.

In *Rothery v. Munnings*, 1 B. & Ad. 15, Lord Tenterden, C.J., in giving judgment says, "When the suit was terminated by a sentence, there is no doubt that the proctor had a right to call for the amount of his bill. His duty was then concluded, unless something should occur to require his further interference. \* \* As, therefore, his right of suing on the items now in question accrued at the time of the judgment, and was not enforced within six years, I think he is not entitled to recover beyond the amount given at the trial." Parke, J., saying, "If the right of action accrues *de die in diem*, as was contended on behalf of the defendant, the items previous to October are within the statute on that ground. But at all events the right accrued when judgment was given on the appeal. In either view of the case the statute is a bar." And in *Darby and Bosanquet's* treatise, p. 26, referring to bills of costs, the learned authors say, "Whatever, therefore, may be the date of the items in the bill, the statute begins to run against all from the date of the termination of the suit."

We are, therefore, of opinion that the rule should go, referring it to the Master to ascertain the amount of items included in the verdict prior to the 17th August 1863, and that the verdict be reduced by that amount and the interest allowed thereon, and that the verdict stand for the plaintiff for the balance; no costs of the rule to be taxed to either party. The costs for which the plaintiff's verdict was taken, as I understand it, were arranged at the trial to be taxed by the Master to settle the true amount.

WILSON, J., concurred.

*Rule accordingly.*

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## PATTERSON ET AL. V. FULLER ET AL.

*Agency—Ratification—Implied authority—Action on replevin bond—Damages.*

In an action on a replevin bond against principal and sureties, the breach assigned was the non-return of a portion of the timber replevied, for which the defendants in replevin, the now plaintiffs, obtained judgment. It appeared that the timber, when replevied, was on the banks of a river some distance above the point where it was intended to be shipped, and by directions of F., the plaintiff in replevin, it was put in the possession of one L., who was F.'s general agent for looking after his lands in that part of the country. L. authorized the defendant in replevin to take it down to the shipping point, where it was again taken possession of for F., by a person appointed by L. to receive it there, and shipped for F. L. had been forbidden by F. to permit this removal to the shipping point, but the defendant in replevin was not aware of it, and such removal was to the benefit of whoever might be the owner.

- Held*, 1. That the receipt of the timber at the shipping point by F. was a ratification on his part of the removal, though such removal was in violation of his orders.
2. That it was properly left to the jury to say whether L., from the nature of the property and its situation, and being appointed agent to receive possession, had reasonable authority to arrange that it should be taken to the shipping point for the benefit of all concerned; and that they were fully warranted in finding that he had.
3. *Seemle*, that the plaintiff, though entitled therefore to recover against F. the value of the timber at the shipping point, could, as against the sureties, recover only its value when replevied.

ACTION on a replevin bond, executed by defendant Fuller as principal, and the other defendants as sureties. The breaches assigned were: 1st, that defendant Fuller did not prosecute the replevin suit with effect; 2nd, and did not make a return of the property replevied, although a return thereof was adjudged in the action to the plaintiffs; 3rd, and did not pay the damages sustained by the plaintiffs, &c.; but therein made default, in this, that the defendant Fuller failed to recover judgment in the action of replevin for 157 pieces of the timber replevied, and for 9000 of the pipe staves also replevied, for which judgment was recovered in the replevin action in favor of the now plaintiffs, and a return was adjudged, &c. And the declaration averred special damages on account of the replevying of the same.

The defendants pleaded to the second breach, that after the sheriff had replevied the said timber and staves, and

before the recovery of the judgment, the plaintiffs wrongfully, and without the consent of the defendant Fuller, the plaintiff in replevin, seized the timber and staves, and took the same out of the possession of the plaintiff in replevin (Fuller), and carried the same out of the County of Lambton. To the first and third breaches the defendants demurred. The plaintiffs took issue on the plea and joined in demurrer (a).

The case was tried at Sarnia at the last Fall Assizes, in 1871, before Richards, C. J.

On the part of the plaintiff a witness, Carolan, the managing agent of the plaintiff, Patterson, proved the value of the timber in question, viz., \$110 per 1000 cubic feet at the place where the timber was replevied, and \$150 where it was shipped; and that the timber was taken possession of by the defendant Fuller or his agents at the shipping port. On cross-examination, he said that the timber was replevied near one Dobbyn's mill, about seventy miles by water above the shipping ground, and that it was brought to that point by Dobbyn's men, Dobbyn having originally contracted to deliver this timber to the plaintiff Patterson. And he said that it was brought to the shipping place by permission of Fuller's agent, one Langstaff, who represented himself to be such agent, and that the witness made the arrangement with Langstaff for its removal by Dobbyn: that \$40 was paid to Langstaff on account of timber that Dobbyn might have cut on Dr. Fuller's land. He stated also that Langstaff never told him that he, Langstaff, had no authority to give the permission for the removal of the timber.

Langstaff was called, who said he acted for Dr. Fuller: that he went with the sheriff to receive, and did get possession of, the timber for Dr. Fuller when it was replevied: that the last witness asked permission to remove the timber to the shipping point (where it was originally intended to be taken): that he objected to its removal, telling him that he had no authority to allow Dobbyn to remove it, and that

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(a) See the judgment on demurrer, reported 31 U. C. R. 323.

if it was removed he would hold him responsible : that as soon as some of the timber had been put in the river he communicated with Fuller's agent, who replied refusing to consent to the timber being removed, which refusal he shewed to Carolan. He also stated that the \$40 referred to by the witness was not paid to him on account of Dr. Fuller, but on a private matter of his own.

On cross-examination, he said he gave the liberty to have the timber brought down to the shipping place, and he supposed they acted on that authority: that Dobbryn did not tell him that he was taking the timber down for Dr. Fuller : that the timber was floated down, and Dr. Fuller took about 109 pieces, which were put on board a schooner ; the pieces averaged 70 to 80 feet.

Mr. McMurray, son-in-law to Dr. Fuller, testified that he acted for Dr. Fuller, and that Langstaff had no authority to authorize the removal of the timber by Carolan, or any one else, that his authority was merely to receive possession and protect the timber : that Langstaff telegraphed to witness to know if witness would allow the timber to be put in the water and floated down, and that he directed him not to permit it; and he produced a letter sent to Langstaff, dated 10th June, 1868, as follows : " I was surprised to find by your letter of 9th inst. that you had still allowed Patterson to deal with our timber. You must stop him at once. The sheriff gave it into your charge for us, and any one who interferes with it now can be had up for stealing or trespass. Take possession of all the timber and staves the sheriff gave you, and hold same for us, and do not let any one move them until you hear from us. You must not offer same for sale without first consulting me. I am inclined to ship the same as it stands on our own account. Therefore you must be careful and prevent any being removed," &c. The witness further stated that Langstaff had a general agency to look after Dr. Fuller's lands and protect the timber thereon, and that he wrote to the sheriff to deliver the replevied timber to Langstaff.

Two witnesses were called to discredit the witness Carolan, and two others to discredit Langstaff.

Dobbyn, one of the plaintiffs, stated that the 200 pieces of timber were on the bank of the stream, and that he received instructions with Langstaff's name to them, authorizing him to take the timber down the river: that he afterwards saw Langstaff at Dresden, and that he told him he was taking the timber down under his instructions for Dr. Fuller, and that Langstaff said that he had given instructions to Carolan, and it was all right, and he would find a man at the shipping place to take care of the timber; and he further said that he did at the shipping point find a person there for that purpose. It appeared also that the timber was taken possession of there by Dr. Fuller's agent.

The learned Chief Justice left five questions to the jury, which they answered, as follows:—

1. What was the value of the 157 pieces of timber at the place where they were replevied? Ans.—\$1187.50.

2. What was the value at the place they were taken to for shipment? Ans.—\$1667.50.

3. How much of the 200 pieces reached the place where it was to be shipped, and how much was taken possession of by the defendant's agent? Ans.—The 200 pieces.

4. Had Langstaff, from the nature of the property and its situation, and being appointed the agent to receive possession of the timber, reasonable authority to arrange that it should be taken down the stream, as being for the benefit of all concerned? Ans.—Yes.

5. Was Langstaff expressly forbidden to allow the timber to be taken down the stream under the arrangement he had made, and were the plaintiffs or their agents notified of that fact? Ans.—He was forbidden, but never notified the plaintiffs or their agent.

And the jury found the average of the pieces to contain 80 feet.

On this finding a verdict was entered for \$6000, the penalty in the bond, and damages assessed on the first and second breaches at \$1867.50, and at 1s. on the third breach; and leave was reserved to defendants to move to reduce the verdict to \$1187.50, with two years' interest thereon,



or as the Court might direct. The defendants' counsel objected to the learned Chief Justice leaving the question of agency as he did to the jury.

During last Michaelmas Term *C. S. Patterson* obtained a rule *nisi* on the leave reserved to reduce the verdict, or for a new trial, the verdict being contrary to law and evidence, and for misdirection in leaving the fourth question to the jury, and on the ground that the assessment of contingent damages on the first breach was not warranted by the evidence.

During the same term *Robinson*, Q. C., shewed cause. There can be no necessity for a new trial, for the verdict is for the penalty, and the Court, under their general jurisdiction over replevin bonds, which are not within the Statute of Wm. III., can do whatever they may think just upon the facts before them. This application is in effect an application for equitable relief against the payment of the penalty; and it is questionable whether there was any necessity for the intervention of a trial at Nisi Prius at all: *Thompson v. Kaye*, 13 C. P. 251; *Johnson v. Parke*, 12 C. P. 179; *Burn v. Bletcher*, 14 C. P. 415; *Bletcher v. Burn*, 24 U. C. R. 259; *Bletcher v. Burn*, 9 Grant 426.

The fourth question was rightly left to the jury. Langstaff was Dr. Fuller's general agent for the care of his lands and timber, and had been so acting for some time. He was in possession also of this particular timber, and was thus apparently invested with authority to do all that he did. The removal, moreover, was desirable, and what should have been done, whoever might turn out to be owner, for it would have been a serious loss to allow it to remain until too late to get it down to the shipping point, and thus lose the whole season. It would be most inequitable, therefore, to allow the defendant to reap the advantage of the plaintiff's labour and expense in the removal, which was incurred in good faith. The defendant has received the timber at the shipping point, thus ratifying

the removal, and should pay its value there. The sureties are liable for whatever the principal may be responsible for, for they are bound in the same words and by the same condition.

*C. S. Patterson, contra.* There was no evidence to warrant the fourth question being left to the jury, or their finding upon it. Langstaff's authority as agent was limited. It never extended beyond a general supervision over Dr. Fuller's lands, and the protection of the timber thereon; and as to this timber he was expressly forbidden to allow its removal. The plaintiff knew him to be an agent only, and should have made enquiries as to the extent of his powers. It is true that the timber, on its arrival at the shipping place, was received by Dr. Fuller through his agent, but that cannot operate as a ratification of the removal. He was still entitled to the possession of the property, wherever it might be; and his resuming it at the point to which it had been taken against his wishes could not prejudice him. It cannot be argued that he was bound to abandon it at the shipping point because his agent, Langstaff, had improperly allowed it to be taken there. At all events, the sureties cannot be liable for any value added to the timber by what was done with it after the replevin: *Archer v. Hale*, 4 Bing. 464.

MORRISON, J., delivered the judgment of the Court.

The principal point raised on this rule is, whether the learned Chief Justice erred in leaving the fourth question to the jury: namely, "Had Langstaff, from the nature of the property and its situation, and being appointed the agent to receive possession of the timber, reasonable authority to arrange that it should be taken down the stream, as being for the benefit of all concerned?"

In order to arrive at a proper conclusion we have to look at the evidence given at the trial. The timber in question was gotten out for the purpose of shipment at a port some distance down the river upon the banks of which it was lying. It was claimed by the defendant Dr. Fuller, who

replevied it. It afterwards turned out that he did so wrongfully. A witness on the part of the plaintiff swore that the timber was floated down to the shipping point under an arrangement made with one Langstaff, the agent of Dr. Fuller. Dobbyn, one of the plaintiffs, testified that the timber being on the bank of the stream he received instructions, under Langstaff's name, authorizing him to float the timber down to the shipping point: that he subsequently saw Langstaff, and told him that he was doing so under his, Langstaff's, instructions for Dr. Fuller: that Langstaff said it was all right, and that he, Dobbyn, would find a person at the shipping place to take charge of the timber on its arrival: that he did find a person for that purpose, who took possession of it as agent of Dr. Fuller; and that the timber was afterwards disposed of and shipped by Dr. Fuller.

On the part of the defendants it was contended that Langstaff had no authority to authorize its removal, but only to receive possession of it from the Sheriff and protect it, and it was proved that Langstaff asked permission to allow it to be removed, and that he was directed not to permit its removal. Langstaff was examined. He stated that he acted for Dr. Fuller, and received possession of the timber from the sheriff for Dr. Fuller: that permission was asked of him to remove it to the shipping place: that he objected, saying that he had no authority to allow Dobbyn to remove it, and that if he did he would hold him responsible. On cross-examination, however, he said he gave liberty to have the timber taken down to the shipping point, and that he supposed the parties acted on that authority.

We may assume that it was the interest of the owner of the timber, whether the plaintiff or Dr. Fuller, that it should be floated to the shipping point. Now it is clear that the timber was floated down under the authority of Dr. Fuller's agent: that another agent of Dr. Fuller at the shipping place received it, and that Dr. Fuller disposed of the timber. These facts alone we think would warrant the finding of the jury on the issue raised, as these facts

amounted to a ratification and confirmation of his agent's acts, although made at first in violation of orders, Dr. Fuller having adopted and taken the benefit and advantage arising from the acts of his agent.

In *Wilson v. Tumman*, 6 M. & G. 241, Tindal, C. J., says, "That an act done *for another* by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, is the known and well established rule of law. In that case the principal is bound by the act whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his *previous* authority."

Upon the question of authority the general doctrine running through all the authorities appears to be, that if a person entrusts another as agent with the possession of property he clothes him with such an authority as might be reasonably supposed to accompany such possession, and Mr. Paley, in his work on Agency, p. 169, says, "Whether the circumstances are sufficient to warrant the inference of such an authority, it is the province of the jury to decide: citing *Dyer v. Pearson*, 3 B. & C. 38.

Take the case before us. Assuming that it was for the interest of the owner that the timber should be floated to the shipping place, and the agent in possession of it employs parties to float it down for the owner, although instructed not to do so, but which instructions were not known to the parties employed; it would be a question for a jury to say whether the circumstances were sufficient to warrant the parties to infer that the agent had authority to employ them. It must be borne in mind that no act is done inconsistent with the rights of the principal in respect of his property, but the mere removal of it from one point to another.

In *Dyer v. Pearson*, cited by Paley, Abbott, C. J., left it to the jury to say whether the defendant had purchased



under circumstances which would induce a reasonable, prudent, and cautious man to believe that the agent of whom he purchased had authority to sell. It was there conceded by counsel, as a general proposition, that a principal is bound by his agent only where he acts within the scope of his authority; but that the case of *Pickering v. Busk*, 15 East 38, shewed that such an authority may be implied from circumstances. And in *Dyer v. Pearson*, on a motion for a new trial, the Court held that the jury ought to have been directed that A. was entitled to recover, inasmuch as B. had no authority to sell the goods, or at least that it ought to have been submitted as a question of fact to the jury whether A. had by his conduct enabled B. to hold himself out to the world as having the property as well as the possession of the goods.

These authorities go to shew that the learned Chief Justice properly asked the jury to say whether under the circumstances Langstaff, the agent, had reasonable authority to arrange that the timber should be removed down the stream for Dr. Fuller: in other words, asking them to say whether Dr. Fuller by his employing Langstaff, who was proved to be his general agent to look after his lands and timber, to receive the timber in question under the writ of replevin, and to protect it, enabled Langstaff to hold himself out to Dobbyn as having power to arrange for and sanction its removal to the shipping place on account of Dr. Fuller. The jury found in the affirmative, and the evidence fully justified the finding. The negative evidence on the part of the defendant Fuller went rather to shew that Langstaff was instructed not to allow its removal by Dobbyn or Patterson as their property. Langstaff in doing what he did was acting within the limits of the authority with which he was apparently clothed, and, as said by Lord Ellenborough in *Pickering v. Busk*, it is clear that an agent in such a case may bind his principal.

On the whole, we do not think that the verdict was contrary to law or evidence, or that there was any misdirection. The only question upon which we entertain any doubt is

with respect to the amount that the verdict should be properly entered for. We are inclined to think that the plaintiff is only entitled to recover, so far as the sureties are concerned, for the value of the timber assuming that it remained at the place it was replevied, which according to the finding would be \$1,329, the value, and two years' interest on the same (*a*).

The rule will be discharged.

*Rule discharged.*

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TOMS AND WIFE V. THE CORPORATION OF THE TOWNSHIP  
OF WHITBY.

*Evidence—Husband and wife—33 Vic. ch. 13, O.*

In an action by husband and wife for injury suffered by the wife, and for consequential damage sustained by the husband, the wife is not a competent witness under 33 Vic. ch. 13, O.

*Quære*, Per *Wilson, J.*, whether a wife joined with her husband for mere conformity under C. S. U. C. ch. 73, sec. 18, would not be admissible, and whether the damages in the present action when recovered would not become her property, under sec. 2 of that Act.

THIS was an action by husband and wife. The first count was for injury suffered by the wife, by reason of the defective state of a bridge, which it was alleged the defendants were bound to repair, and on which the wife was driving with her son; and the second count for consequential damages sustained by the husband.

The verdict was for the plaintiffs, with \$750 damages on the first count, and \$50 damages on the second count.

The wife was examined as a witness at the trial, after objection to it by the defendants.

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(*a*) The verdict was for the penalty \$6000, and *Robinson, Q. C.*, for the plaintiffs, upon the above expression of opinion, consented not to enforce the execution against the sureties for more than the \$1329 and interest. The rule upon this consent was discharged, thus leaving the difference between that sum and damages as assessed for the value of the timber at the shipping point to be recovered against the principal only.

*Harrison*, Q. C., in Michaelmas Term last, obtained a rule calling on the plaintiffs, among other things, to shew cause why the verdict should not be set aside and a new trial granted for the admission of such improper evidence.

In this Term *M. C. Cameron*, Q. C., shewed cause. The wife was examined on the cause of action stated in the count for her personal suffering and injury. The Ontario Act, 33 Vic. ch. 13, permits parties to suits generally to be witnesses. Sec. 5 only excludes husbands and wives from being witnesses the one for or against the other. If when husband and wife are joined in the action, the act is construed according to the defendants' contention, it will place the husband at a greater disadvantage than if he had sued alone, for in the latter case he would certainly have been an admissible witness, while in the former case both he and his wife will be excluded: *Barbat v. Allen*, 7 Ex. 609; *Stapleton v. Crofts*, 18 Q. B. 367.

*Harrison*, Q. C., supported the rule. The wife gave important evidence for her husband in denying contributory negligence. The damages under the first count are the damages when recovered of the husband, not of the wife: *Harrison v. Almond*, 4 Dowl. 321. Her evidence was therefore inadmissible under the express words of sec. 5.

WILSON, J., delivered the judgment of the Court.

The rule also called on the plaintiffs to shew cause why the judgment should not be arrested, as shewing no legal duty on the defendants to have used due and proper care and skill in the construction of the said bridge and embankment, nor any legal duty to have placed proper guards or railing along the sides thereof, so as to render the said highway safe and convenient to travel thereon as aforesaid; or why a nonsuit should not be entered by reason of the wife's contributory negligence, and on other grounds. We do not think it necessary to deal with any of these questions at present, as in our opinion there must be a new trial because of the improper reception of the evidence of the wife.

In an action by a woman suing as a *feme sole* her husband was an incompetent witness for defendant to prove the plaintiff's marriage: *Bentley v. Cooke*, 3 Dougl. 422.

So when a married woman was sued, and pleaded her coverture, the husband was not admissible as a witness for her to prove the marriage: *Woodgate v. Potts*, 2 C. & K. 457.

A woman who married a party to the suit after she had been subpœnaed, was not admissible as a witness: *Pedley v. Wellesley*, 3 C. & P. 558. So in *Davis v. Dinwoody*, 4 T. R. 678, an action by the trustee of the wife against the sheriff for seizing the goods held in trust for the wife on an execution against the husband, the husband was held not to be an admissible witness merely to prove the identity of the goods.

In some cases evidence was admissible on the ground of necessity, as in an action against the Hundred for redress for robbery, the plaintiff was a good witness: B. N. P. 289 *a*, 289 *b*. So a party's own deposition when sued for a malicious prosecution: *Jackson v. Bull*, 2 Moo. & Rob. 176. So, it was said, when a carrier was sued for the loss of goods, the plaintiff was a good witness, "for every one did not shew what he put into his box:" per *Montague*, B., cited in 12 Vin. Ab. p. 24, sec. 34.

This last case has always been considered doubtful. But the rule as to husbands and wives being inadmissible as witnesses for or against each other, when either or both was a party or were parties to the suit, or was or were interested in it beneficially, unless in a criminal prosecution by the one for violence to the other, has never been doubted; and has in this country never been relaxed, although the rule is otherwise now in England since the 16 & 17 Vic. ch. 83.

I am not sure whether a married woman, joined in a suit with her husband for mere conformity, under the Consol. Stat. U. C. ch. 73, sec. 18, might not be a good witness in respect of a claim arising in respect of her real estate of debt or contract, for it is her own suit, her husband is no



way liable even for costs if she fail, unless he plead a false plea, and then only for such costs as his false plea has occasioned.

The damages in the present action, when recovered, I should be disposed to think, would, under the second section of that Act, become the property of the wife, as "in any way acquired by her after marriage," although the general rule undoubtedly is, that such a claim is the property of the husband alone.

In any event this claim for a personal wrong to the wife does not come within that Act, and in no way of considering the case can I see how the wife or the husband either can be a witness.

I had entertained a different opinion, but I had not considered it sufficiently, and I regret extremely the cramped and useless interpretation we are compelled to place upon the statute.

I trust the Legislature will yet make the law of evidence what it ought to be, the means of bringing out the truth fully and freely, untrammelled with the fetters and perplexities of a gone-by age and system.

After a wife has been allowed in an action to which her husband was not a party, to be asked whether her husband "was a fit man to be believed upon his oath": *Annesley v. Earl of Anglesea*, 17 St. Tr. 1276—and after a wife has been permitted to prove that she, Mary, was married to her husband before the time he swore he was married to the pauper Elizabeth, in a settlement proceeding: *Rex v. The Inhabitants of Bathwick*, 2 B. & Ad. 639 (see *Reeve v. Wood*, 5 B. & S. 364)—and since either husband or wife may prosecute the other criminally for personal violence done by one to the other, and may testify in the cause,—there need be no scruple in putting them under the like law in all civil proceedings where they are both or either of them is personally interested.

We have consulted with the Judges of the Common Pleas, and we are unanimously of the opinion that, in such an action as the present, the wife is not a competent witness.

The rule must therefore be absolute for a new trial without costs.

*Rule absolute. (a)*

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THE EDINBURGH LIFE ASSURANCE COMPANY V. FERGUSON  
AND FOUR OTHERS.

*Evidence—Presumption of death—Sale of lands for taxes.*

The patent from the Crown issued in 1848 to Mary Anne Tribe, describing her as the wife of Benjamin Tribe. In 1853 she conveyed to L., not describing herself as a widow.

*Held*, that the description in the patent was some evidence of her being married when it issued; but the Court being left to draw inferences as a jury presumed, in favor of the validity of her deed made in 1853, that she was then sole and competent to convey.

The mortgage under which the plaintiffs claimed, executed in 1861, described the land as lot 5 in the 4th concession of Flos, containing 200 acres "save and except 35 acres sold off the east side of said lot number five to Jonathan Lane for taxes." Lane had bought 35 acres in 1858. The certificate of purchase then given to him by the sheriff had a diagram sketched on it, shewing this to be the east 35 acres, and the same diagram was on the certificate and deed given in 1865 and 1866 to one J., who purchased the remaining 165 acres, and under whom the plaintiffs claimed. *Held*, that the description in the mortgage was sufficient, the exception being thus clearly defined.

The patent granted the lot by north and south halves. The patentee in 1853 conveyed the lot as a whole, and it continued in one owner until the sale of the 35 acres in 1858 above mentioned. In 1858 and 1859 each half was assessed separately. *Held*, not objectionable.

For the next three years it was assessed in two parcels of 165 acres and 35 acres, and for the succeeding two years the north half, 100 acres, and the west part south half, 65 acres, were assessed, with a valuation of \$330 on the whole. *Held*, right.

In 1865 the 165 acres was sold for the taxes due for six years, including 1858, which was not covered by the warrant under which the 35 acres were sold in that year. *Held*, that the sale as to 1858 could not be supported, for all or a part of each half should have been sold for the taxes due on it for that year, notwithstanding the sale of the 35 acres: that as there were not five years due of any portion of the residue for which the warrant issued, the whole sale must fail; and—following *Yokham v. Hall*, 15 Grant, 335—that this defect was not cured by the 27 Vic. ch. 19, sec. 4, 29–30 Vic. ch. 53 sec. 131, or 32 Vic. ch. 36, sec. 130 O.

But for that decision *Wilson, J.*, would have held otherwise.

The sheriff's deed was given on the 19th of May, 1866, and the action was not brought until the 13th of January, 1871. *Held*, that the

plaintiff was not barred by the 29-30 Vic. ch. 53, sec. 156, passed on the 15th of August, 1866, which made valid all tax deeds due before it, unless questioned within four years from their date; for that the effect of the 32 Vic. ch. 36, sec. 155, O., passed on the 23rd of January, 1869, was to give two years from the passing of that Act to all whose rights were not then barred.

It was objected that the description of the land on the roll and in the warrant as the N.  $\frac{1}{2}$  and W. pt. S.  $\frac{1}{2}$ , 165 acres, and the N.  $\frac{1}{2}$ , 100, and W. pt., S.  $\frac{1}{2}$ , 65, was insufficient; and that the treasurer had improperly altered the roll so as to reduce the taxes by one half, and make the description still more defective—but *Held*, that these objections would be cured by the 27 Vic. ch. 19, sec. 4, and 29-30 Vic. ch. 53. sec. 131. *Held*, also, that the plaintiff was not bound to pay the value of improvements under 33 Vic. ch. 23, O., for the sale was not void by reason of uncertain or insufficient description of the lands sold, and therefore not within the statute.

EJECTMENT for lot number 5 in the 4th concession of the township of Flos, containing 200 acres, save 35 acres sold off the east side of the lot to one Jonathan Lane, for taxes.

The plaintiffs claimed title by indenture of mortgage from John B. Robinson to them, dated 18th of March, 1861.

Two of the defendants of the name of Ferguson defended for one acre at the south west corner of the lot.

John Mitchell defended for the north half of said part of said lot, except 40 acres sold by him.

John W. Banker defended for the westerly part of the south half containing 50 acres.

Michael Mitchell, the remaining defendant, did not appear.

The four defendants who appeared all denied the plaintiffs' title.

The two Fergusons asserted the title in themselves as tenants of William Johnson, who was the vendee of the sheriff of the County of Simcoe, who sold the land for taxes.

John Mitchell asserted title in himself by a deed from William Johnson and his wife to him, dated 18th June, 1866.

John W. Banker asserted title in himself by a deed from William Johnson and wife to him, dated 1st of February, 1869.

The cause was tried at the last Spring Assizes at Barrie, before Galt, J.

The plaintiffs' title was proved as follows :

Patent from the Crown, 12th of September, 1848, to Mary Anne Tribe, wife of Benjamin Tribe, of the whole lot.

Deed, dated 6th of April, 1853, from Mary Ann Tribe to John Henry Lefroy, of the whole lot.

Other conveyances from the last named grantee and his grantees to the mortgagor, from whom the plaintiffs claimed as before stated, were put in. The mortgage to the plaintiffs was of the whole lot "excepting 35 acres sold off the east side of the lot to Jonathan Lane for taxes."

It was objected by the defendants' counsel that the deed from Mary Anne Tribe was not executed in compliance with the Statutes : that her husband was no party to it ; that in the patent it appeared she was a married woman, and there was no evidence of her husband's death.

Leave was reserved to the defendants to move on that point.

A deed was put in, dated 17th of May, 1866, from B. W. Smith, sheriff of County of Simcoe, to William Johnson, of the north half and the westerly sixty-five acres of the south half of the lot in question, describing it by metes and bounds. The price was \$78.18. The sale was for arrears of taxes.

Also, a warrant, dated 1st September, 1864, from the County treasurer of Simcoe to the said sheriff, to sell the 165 acres in question, described as follows :

Flos.	New survey.	Lot.	Con.	Acres.	\$	c.
N. pt. and W. pt. S. $\frac{1}{2}$		5	4	165	71	12

It was admitted the sale was made by the sheriff to William Johnson on the 10th April, 1865 : that the advertisements were duly made ; and that they were made of the land as described in the warrant.

*Henry R. A. Boys*, the County treasurer, said : The sum of \$71.12 in the warrant was the amount due on my books on the 165 acres. The taxes in arrear were assessed as follows, as copied from the non-resident rolls, so far as material.



			Statute Labour,		
			Days.	Per day.	Total.
				\$ c.	\$ c.
For 1858	N. $\frac{1}{2}$	100			
	S. $\frac{1}{2}$	100			
1859		35		1 00	88
		165	2	2 00	3 52
1860	S. pt. E. $\frac{1}{2}$	35			
	N. $\frac{1}{2}$ & W. pt. S. $\frac{1}{2}$	165			
1861	E. pt. S. $\frac{1}{2}$	35			
	N. $\frac{1}{2}$ & W. pt. S. $\frac{1}{2}$	165			
1862	E. pt. S. $\frac{1}{2}$	35			
	N. $\frac{1}{2}$ & W. pt. S. $\frac{1}{2}$	100			
	W. pt. S. $\frac{1}{2}$	65			
1863	W. pt. S. $\frac{1}{2}$	65			
	N. $\frac{1}{2}$	100			

Intermediate columns making up other rates for 1859 to \$2.40

No deduction was made for statute labour, but the statute labour was less than if the lot had been divided. The apportionment was made before I was treasurer.

The Roll, as it first stood for 1859, was :—

			Statute Labor.	\$1 per day.	Total.
1859.	N. $\frac{1}{2}$ .	100 acres.	2 days.	\$2	\$4 40
	S. $\frac{1}{2}$ .	100 acres.	2 days.	2	4 40

but it was altered by the treasurer as above stated.

The plaintiff put in the certificate given to the purchaser by the sheriff at the tax sale, which commenced as follows :  
 “ I certify that I have this day sold 165 acres of 165 N. pt. W. pt. S.  $\frac{1}{2}$  lot No. 5, in the 4th concession in the Township of Flos, to William Johnson,” &c.

The counsel for the plaintiffs objected that the land was not properly described, and the sale was therefore void : that the land was not properly described in the assessment roll, or in the warrant : that the treasurer had no right to apportion the taxes in 1858 and 1859, and without the taxes for those years there were not taxes due for five years, for which a sale was directed to be made.

The learned Judge thought the description was insufficient, upon which the defendants proceeded. They proved a title from William Johnson, the purchaser for taxes.

The defendants' counsel contended that the want of a sufficient description in the certificate, and in the assessment rolls, was cured by the Assessment Act of 1865, ch. 53, sec. 156.

The plaintiffs' counsel contended that the description of the land was insufficient, and was not helped by the diagram in the margin, which was there at the time the deed was executed.

Evidence was then gone into to prove the value of the defendants' improvements and the value of the land.

The jury found the value of the land to be \$1.50 per acre: that the value of Ferguson's improvements was \$1005.75; the value of Mitchell's \$275; and the value of Banker's \$312.50.

The learned Judge then directed a verdict to be entered for the defendants, with leave to the plaintiffs to move to enter a verdict for them, if the Court should be of opinion that on the whole evidence, subject to the objections taken, the plaintiffs were entitled to recover, the Court to be at liberty to draw inferences, and to enter the verdict as they might see fit under the provisions of the Tax Title Act. The verdict was thereupon rendered for defendants.

In Easter Term last, *Kennedy* obtained a rule calling on defendants to shew cause why the verdict should not be set aside, and a verdict entered for the plaintiffs, on the ground that no title was shewn by the defendants displacing the title of the plaintiffs, inasmuch as the tax sale and deed from the sheriff, under which the defendants claimed, was void for the following reasons: 1. That the land was not properly assessed for the years 1861, 1862, and 1863.

2. That no taxes were properly imposed on the lands for the years 1858 and 1859, the treasurer having no power to impose taxes as he did.

3. That taxes were not due for a sufficient period to render the land liable to be sold.

4. That the description of the land in the warrant and advertisement was uncertain, and did not state what portion of the land was sold for taxes whereby the same could be known.

5. That the sheriff did not state what part of the land he intended to sell at the sale for taxes, and that the certi-

ficate of sale given to the purchaser does not properly describe the land sold, so that the same could be known.

Or why a new trial should not be had, on the ground that the plaintiffs can produce further evidence to prove the death of the husband of Mary Ann Tribe, and the description of the land sold to Jonathan Lane, on grounds stated in the affidavits filed.

In Michaelmas Term last *McCarthy* and *Strathy* shewed cause. The land was sold for arrears of taxes for the years 1858 to 1863, both inclusive. The sale was in 1865. As to the taxes for 1861, 1862, and 1863, they were rightly assessed.

The Tax Act cured the defects: 27 Vic. ch. 19 sec. 4; *Bank of Toronto v. Fanning*, 18 Grant 391. In 1858 the lot was assessed as the north half and the south half. The 35 acres were sold on the 7th of September, 1858. The 165 acres were sold on the 10th of April, 1865, and produced the amount of taxes, about \$78, then charged against that portion of the lot. In 1859 the lot was firstly assessed as in 1858 by the north half and the south half, and each 100 acres were entered for \$4.40. That rating was altered, and it stood as corrected as follows: The 35 acres at 88c and the 165 acres at \$3.52, making 4.40, which was in fact the rating upon only 100 acres, or upon one half of the whole lot, the rating on the other half of the lot, \$4.40, having been struck off altogether by mistake. After the sale of the 35 acres in 1858, the treasurer should, probably, have made three divisions of the lot: the 35 acres, the 65 acres, and the 100 acres. There were, however, taxes due on the lot at the time of the sale in 1865, although it may be there were informalities. The 29-30 Vic. ch. 53 sec. 156, prevented defects of this kind being raised after four years. The Ontario Act, 32 Vic. ch. 36 sec. 155, repealed the previous Act, and restricted the time to two years; but it cannot be held to have given any longer period to those who were entitled to the protection of the earlier Act, for that would be to give to the plaintiff six years instead of four years.

The Ontario Interpretation Act, sec. 7, subsec. 34, provides that the repeal of an Act shall not affect any act done or right of action existing, accruing, accrued or established before the time when the repeal takes effect, so that the limitation of four years is still binding on the plaintiffs. It is admitted that the Ontario Tax Act, 33 Vic. ch. 23, does not apply in this case. The 9th sec. of that Act does however apply so as to entitle the defendants to the benefit of their improvements, which were assessed at the trial. The warrant, it was said, did not describe the 165 acres correctly. The description was sufficient according to the case of *Grant v. Gilmour*, 21 C. P. 18. As to the new trial, the rule is that a new trial will not be granted when the party could have given evidence which he did not produce. The plaintiffs should have been prepared to prove that the patentee was a single woman when she made her deed: *Cooke v. Berry*, 1 Wils. 98; *Ch. Arch. Pr.*, 12th ed., 1529, 11th ed. 1515; *Thorpe v. Stallwood*, 1 D. & L. 37; *Rogers v. Stephens*, 2 T. R. 718; *Austin et al v. Evans*, 2 M. & G. 440; *Rearden v. Minter*, 5 M. & G. 204.

The patent was issued to a married woman. She afterwards made a conveyance, on which the plaintiffs depend as part of their title, and no proof was given that her husband was then dead. That fact should have been proved. The husband was living in 1848 when the patent issued, and the patentee conveyed in 1853. The presumption is that the husband was then living. The description of land conveyed to the plaintiffs in the mortgage to them, of "200 acres, less 35 acres off the east side sold to Jonathan Lane," is not sufficient: *Cole on Ejectment*, 85; *Best on Ev.* 473; and no parol evidence was given to identify it.

*Kennedy* supported the rule. The description in the mortgage to plaintiffs is sufficient: *Cole on Ejectment* 85, 116; 2 *Preston on Con.* 363-4, 386-7; *Doe dem. Griffin v. Mason*, 3 Camp. 7; *Doe dem. Lewis v. Bingham*, 4 B. & Al. 672. If it be necessary to prove that the patentee was a *feme sole* when she conveyed in 1853, it should be allowed



to be done; it was (if necessary) a mere oversight. The limitation by the tax act will be a bar to a new action, and the plaintiffs are the legal owners of the land unless defeated by the tax sale, and in such a case, against a merely formal defect, a new trial will be granted if only to save the useless expense of bringing another action: Per *Tindal*, C.J., in *Doe dem. North v. Webber*, 3 Bing. N. C. 922, 928; *Weak d. Burge v. Callaway*, 7 Price 677. The husband of Mary Anne Tribe, the patentee, died on the 22nd of August, 1848, although the patent of the 12th of September, 1848, describes her as the wife of Benjamin Tribe. The plaintiffs have two years allowed to them under the Ontario Act, 32 Vic. ch. 36 sec. 155, which time had not expired on the 13th of January, 1871, when this suit was commenced. Neither the repealing clause, sec. 204 of the 32 Vic. ch. 36, O., nor the 34th subsection of the 7th sec. of the Interpretation Act, 31 Vic. ch. 1, O., precludes the plaintiffs from the benefit of the extended period of the two years. It was intended to give such further time to parties, because ch. 35 of the same session, passed on the 23rd of January, 1869, stayed the plaintiffs from bringing the action until after the end of the next ensuing session of the Legislature, and by such stay they were prevented from bringing their action within the four years under the Act of 1866, which but for that Act they could have done at any time within four years from the 15th of August, 1866, the day of the passing of the Act 29-30 Vic. ch. 53. The 29-30 Vic. is inconsistent with 32 Vic., and the former is therefore repealed: *O'Flaherty v. McDowell*, 4 Jur. N. S. 33. The mode of assessment with respect to this lot, as stated for the defendants, is clearly bad. Consol. Stat. U. C. ch. 55, sec. 31. subsec. 3, shews this lot should have been assessed in several parts, and that the assessment adopted was void: *Yokham v. Hall*, 15 Grant 335. The treasurer had no right to alter the roll for the year 1859 as he did. Secs. 118 and 119 of ch. 55 shew how far the treasurer may make corrections. The warrant to the sheriff, which shews a single rating on the 165 acres, without describing what part of the whole lot these acres represent, is void because it shews a single instead of a separate rating, and because

the land mentioned therein is not sufficiently identified. The advertisements are bad for the same reasons, and so also is the sheriff's certificate granted on the 10th of April, 1865: *Grant v. Gilmour*, 21 C. P. 18; *Knaggs v. Ledyard*, 12 Grant 320; *McDonell v. McDonald*, 24 U. C. R. 74; *Shaefer v. Lundy*, 20 C. P. 487.

WILSON, J., delivered the judgment of the Court.

The objections which were made to the plaintiffs' title were, firstly, that Mary Anne Tribe appeared by the patent, which was dated on the 12th of September, 1848, to be a married woman, and she conveyed the land on the 6th of April, 1853, without describing herself as a widow; and as it was not proved at the trial she was competent to convey alone, it must be assumed she was still a married woman in 1853, when she did convey; and that her conveyance was therefore void.

And, secondly, that the description of the 165 acres conveyed by the mortgage to the plaintiffs was void and insufficient.

It appears now by the affidavits filed that the husband of the patentee had died about three weeks before the patent issued, which fact was not likely to have been known at the Government Offices at the time of the preparation of the patent.

It is an objection of the strictest kind, and not entitled to any favour. It can only be allowed to prevail if it cannot be got over.

The general rule is, as was stated, that things once proved to have existed in a particular state are to be understood as continuing in that state until the contrary is established by evidence either direct or presumptive: *Best on Presumptions*, sec. 136.

If coverture were pleaded in abatement to a suit by a woman, the fact of her being a married woman, on issue being joined on the plea, would have to be proved by the defendant, the affirmative resting upon him. Upon proving that the husband of the plaintiff was living in

1848, her action being brought in 1853, sufficient evidence to support the plea would have been given. The plaintiff would then have to give evidence of such facts which might properly raise a presumption of the death of her husband, although the usual presumptive period of seven years adopted in such cases had not elapsed, as the extreme old age or very infirm health of her husband, or that he had been exposed to extraordinary peril, and had not for a year or two, and in some cases for a much shorter period, since been heard of as alive, while in all probability he would have been heard of if he had been living: *Rex v. The Inhabitants of Harborne*, 2 A. & E. 540; *Watson v. King*, 4 Camp. 272. See also *Re Benham's Trust*, L. R. 4 Eq. 416; *Nepean v. Doe dem. Knight*, 2 M. & W. 894.

In this case there was some evidence that the patentee was a married woman at the time of the grant to her on the 12th of September, 1848, and it could not, in the absence of all testimony to the contrary, be assumed that her husband was dead, and that she was sole and competent to convey on the 6th of April, 1853: *Doe dem. France v. Andrews*, 15 Q. B. 756; *Doe dem. Lord Ashburnham v. Michael*, 17 Q. B. 276.

If on a charge of bigamy she had been proved to have been a married woman in 1848, and to have married a second time in 1853, a *prima facie* case would have been made against her. On such a trial an actual marriage in 1848 would have to be proved. In an action like the present such strict proof need not be given.

The only question is whether the mere fact of describing the grantee in the patent as the "wife of Benjamin Tribe," is such evidence which called on the grantee or on those claiming under her to shew she was not then, or at the time when she conveyed, a married woman?

We think it is. It is not strong evidence, but it is some evidence of the fact being as represented. And so long as it was not conclusive the jury might have found against it. It would have been better, therefore, if the question had been left to them, instead of being reserved for the Court.

The whole evidence has however been referred to the Court, with liberty to draw inferences. The Court may, therefore, do what the jury might have done : *Daniel v. Metropolitan R. W. Co.* L. R. 3 C. P. 591.

If this had been an action by the patentee against her own grantee, the jury should upon such evidence have presumed in favour of the validity of her own conveyance against the mere statement made in the patent that she was a married woman, and they should have presumed against her being a married woman at the time she conveyed. The defendant, however, is not claiming under her, but against her title. It was properly a point for the jury : *Cottrell v. Hughes*, 15 C. B. 532, 555, 556.

If the evidence had been expressly given—that is, sworn to—that the patentee was a married woman in 1848, it may be the jury should not, in the absence of all evidence, have presumed that she was sole in 1853, and in order to give effect to her conveyance it is necessary we should go so far, though I am by no means prepared to say they might not have made such a presumption. But when all the evidence which was given was that which the patent itself disclosed—a part of her title to be sure, yet still made by those who cannot and do not know the actual state of things when it is executed—I do not think we are going too far in acting upon the power reserved to us of finding, as the jury might certainly have done, rather in favour of the validity of the conveyance which was made by the patentee in 1853, under which a valuable property was transferred to the plaintiffs as *bonâ fide* purchasers, than according to the description given of the woman in the Crown grant.

It is fortunate we are able to come to this conclusion, as the fact is, according to the affidavits filed, that the patentee was in truth sole and competent to convey alone, not only in 1853, but in 1848, when the patent issued, as her husband had died about three weeks before the date of the patent.

The next objection to the plaintiffs' recovery was, that in the mortgage to them the land was described as follows :  
“Lot number five in the fourth concession of the Township



of Flos, in the County of Simcoe, containing two hundred acres, save and except thirty-five acres sold off the east side of said lot number five to Jonathan Lane for taxes."

This mortgage was made in 1861, and long before the tax sale was made under which the defendants claim title. The plaintiffs in 1861 were the legal owners of the land in question, and, so far the evidence shews, there was no opposing title or claim of any kind, and no one was in actual possession.

At that time Jonathan Lane was the owner or claimant of thirty-five acres of the lot, which he had bought at a previous tax sale made in 1858. The only description of the thirty-five acres by the assessment rolls was, that it was the "east part of the south half of the lot."

The certificate of purchase given by the sheriff to Lane in 1858 had a diagram sketched roughly on it giving the figure of the whole lot of 200 acres; then by a line drawn from east to west dividing the lot into north and south halves; then by a line from north to south, dividing the south half into portions, 35 acres to the east of the line, and 65 acres to the west of it. The like diagram is on the back of the certificate given to William Johnson in 1865, and on the face of his deed from the sheriff given to him in 1866.

These facts shew—without reference to the deed which Jonathan Lane got from the sheriff on the 10th of September, 1859, and which was registered on the 26th of the same month, and which describes the 35 acres by metes and bounds, but which was not produced at the trial, and appears now only on the affidavit filed—that the 35 acres sold to Jonathan Lane were the most easterly 35 acres of the south half of the lot. That being so, the exception in the mortgage of "thirty-five acres sold off the east side of said lot to Jonathan Lane for taxes" has a defined application given to it; and that being so, the remainder of the lot was quite plainly and certainly described.

This disposes of the sufficiency of the plaintiffs' title.

The question is, whether the defendants have established their tax title.

The first objection in point of time is as to the assessment for the years 1858 and 1859. The lot for these two years was assessed as the *north half*, and the *south half*, and the objection is, that it was so divided.

The patent granted this lot by halves, the north half and the south half.

It has been heretofore objected that the assessment of lands in separate parcels by the officer of his own mere motion, when they had been granted in a single block or lot, was not a valid assessment: *Doe dem. Upper v. Edwards*, 5 U. C. R. 598.

In *McDonald v. Robillard*, 23 U. C. R. 105, it was held, on a grant of lot 18 and the west part of 19, containing together 200 acres, that each parcel should have been separately assessed. *Morgan v. Quesnel*, 26 U. C. R. 539, refers to the same land: see observations of Draper, C. J., at p. 544. See also *Ridout v. Ketchum*, 5 C. P. 50.

I do not think it is objectionable, when land is granted in different parcels, to assess it in that manner, whether the grant be made by the Crown or by a subject. I do not see any objection to the owner returning his land in different parcels for the purpose of being assessed separately, and to the officer assessing it as he has been desired to do.

I do not say that the same lot when granted in different parcels must be assessed in the same parcels in which it was granted, nor do I say that the assessor would be bound to make several parcels of the same lot, and to assess them separately merely because the owner desired him to do so. But when the owner does request to have his lot assessed in certain parcels, and if it is done, he cannot object to it, nor can any one else, if he cannot. And I think that a grant of the land in separate parcels, from the Crown at all events, may be looked upon as an authority to assess the land in that manner, and as an assent of the grantee to have it so assessed. An assessment of the whole lot in one block, or otherwise, so long as no mischief or injury has been occasioned by it, should not, if it be possible to avoid

it, be held to defeat the rating which may have been going on uninterruptedly so far as the owner is concerned for perhaps many years, and to add to the perplexities of tax titles and tax trials.

The rating of this land in the half lots in which it was granted by the Crown is not objectionable. It was right to do so while the patentee held the land, and although she conveyed the land afterwards as a whole lot, and it continued to be so held in the one hand until it was subdivided by the sale of the 35 acres for taxes in 1858, it was not improper to continue the rating as it had been begun.

The lot, after the sale of the 35 acres in 1858, was rated for three years in two parcels of 35 acres and 165 acres, the 35 acres belonging to Jonathan Lane, and the 165 acres to the mortgagor. I am not prepared to say that such a rating was wrong, for the land was then held in fact in that manner by these two persons as the owners, and it was no prejudice to the owner of the 165 acres to be so rated, instead of for the north half 100 acres, and the residue of the south half, 65 acres, in two parcels.

In the last two years the 165 acres were rated thus:

N. $\frac{1}{2}$ 100	}	165 acres, with a value on the total quantity of \$330.
W. pt. S $\frac{1}{2}$ 65		

Each one of these six years was, as I have said, by itself rightly rated.

Yet when they are all added there must be a difficulty in enforcing payment by a sale, by reason of the three different modes of rating, although the mode of rating from 1859 to 1863 seems to be substantially the same. There were at all events two modes of rating.

In 1858, thus: }	N. $\frac{1}{2}$ 100	}	The 35 acres are here omitted after 1858, as they are no longer in question in this suit.			
	S. $\frac{1}{2}$ 100					
1859, }	N. $\frac{1}{2}$ & W. pt. S. $\frac{1}{2}$ 165	}				
1860, }						
1861, }						
1862, }				N. $\frac{1}{2}$ 100	}	165
1863, }				W. pt. S. $\frac{1}{2}$ 65		

When the taxes for 1858 were five years in arrear, what part of the land should have been sold, the half lots having been separately assessed ?

On the authorities a part of each half lot should have been sold for the particular assessment made against it. Consol. Stat. U. C. ch. 55, sec. 128, is to the same effect. But the sale which was made in 1865 of the 165 acres was a sale of the residue of the whole lot for the separate charges which were due for 1858 upon each half, and not a sale of a part of each half for its own special charge for that year.

If the sale for the taxes for the year 1858 cannot be sustained, the whole sale fails, for there were not five years of any portion of the residue of the taxes due for which the warrant issued to sell.

At the time of the sale in 1858 of the 35 acres, the taxes for 1858 were not included, because they were not covered by the warrant. The whole of the taxes on each half of the lot remained due for that year, notwithstanding the sale of the 35 acres in that year for the previous years' taxes. Each full half of the lot therefore continued to be and was liable for the taxes for 1858 up to and at the time of the issuing of the warrant in 1864. But that warrant was against the 165 acres only, which was right enough for 1859 and the subsequent years, but altogether wrong for the year 1858, because for that year's arrears the whole 100 acres of each half lot were liable.

The objections then to the sale as applicable to the year 1858 are, firstly, that the whole of that year's taxes on each half lot were combined, as if the whole lot had been assessed in one sum, and the warrant issued for that sum as due (with later years) upon only 165 acres, part of the lot, instead of on the whole half of each lot.

2ndly, That the warrant to sell for the taxes for 1858 should have been against each full half of the lot for the amounts which had been rated against the same respectively.

3rdly, That the sale for the taxes for that year should have been of each half of the lot, or of a part of each half



of the lot, for the amount which had been assessed against it, according to the necessity there was or might be of selling the whole or a part of each half.

4thly, That the sale was of 165 acres of the lot, as if the taxes for 1858 (as well as the subsequent taxes) were a single charge upon that particular portion of the lot.

5thly, That if the 165 acres could have been rightly sold for the taxes due upon each half of the lot for 1858, the north half should have been sold for its own particular charge for that year, and the residue of the 65 acres for the particular charge due upon the south half of the lot.

6th, That in no way could the 165 acres have been lawfully sold as they were for the taxes for 1858, although the assessments may have been lawfully imposed on the 165 acres for the subsequent years.

The effect is, that if the sale for the year 1858 fail, as we think it must, there were not five years in arrear to justify a sale at all.

But it was said the joining together of the two rates on the half lots, and the other irregularities referred to, were cured by the 27 Vic. ch. 19 sec. 4.

The language of that provision is exceedingly strong, that "if any taxes in respect to any lands sold by the sheriff after the passing of this Act shall have been in arrears for five years \* \* \* and the same shall not be redeemed in one year after the said sale, such sale and the sheriff's deed to the purchaser of any such lands (provided the said sale shall be openly and fairly conducted) shall be final and binding upon the former owners of the said lands, and upon all persons claiming by, through or under them." And the 29-30 Vic. ch. 53 sec. 131, and 32 Vic. ch. 36 sec. 130 are even stronger: *Bank of Toronto v. Fanning*, 18 Grant 391. I do not see why the mere adding together of the two rates, and treating them as a single charge on the whole lot, the sum on each half being exactly alike, and selling a part of the whole lot as for the one rate, so long as the two half lots are owned by the same person, should under such language defeat the sale openly and

fairly conducted, although a different part of the lot would be sold in such a case, than if each half of the lot had been offered for sale for its own special charge.

But it has been so decided in *Yokham v. Hall*, 15 Grant 335.

This case differs greatly from the one just cited. In 1865, when this land was sold, 35 acres were owned by Lane and 165 acres by the mortgagor, and for 1858 the 165 acres were charged with and sold for the taxes due on the 200 acres. I am not prepared to say that even such a case as that is not within the protection of the Statute, because there were taxes due in respect to the 165 acres, which were in arrears for five years, and the land was not redeemed, and the sale was openly and fairly conducted. The decision referred to, however, determines the question.

Then it was contended that by the 29-30 Vic. ch. 53 sec. 156, the sheriff's deed given on the 17th May, 1866, was to all intents and purposes valid and binding on the plaintiffs, because it had not been questioned by them within four years after the passing of the Act, 15th August, 1866.

The answer was that the Ontario Act 32 Vic. ch. 36 sec. 155, which repealed the preceding one, re-enacted its 156th section, excepting that the time is reduced to two years after the passing of this Act, the later one, and which was passed on the 23rd of January, 1869, and this action was brought on the 13th of January, 1871, ten days within the period of prescription.

The defendants replied to that the Ontario Interpretation Act, sec. 7, subsec. 34, which declares that the repeal of an act shall not affect any act done or any right or right of action existing, accruing, accrued, or established before the time when such repeal shall take effect, &c.; and also the 204th section of the 32 Vic. ch. 36, which declares that the former act was repealed "saving any rights, proceedings, or things legally had, acquired, or done under such acts or any of them; and all things begun but not completed thereunder may be continued to completion as

validly and with the same effect as if this act had not been passed," &c.; and that from these two enactments the period of prescription of four years, which began on the 15th of August, 1866, was not affected or extended by the 155th section of the Act of 1869, but ended on the 15th of August, 1870, and perfected their title on that day against all irregularities. To this it was rejoined, that before the four years were completed the 32 Vic. ch. 35, passed on the 23rd of January, 1869, stayed all actions and suits then pending respecting tax titles, and prevented any others from being brought until after the end of the next ensuing session of the Legislature of this Province; and when the period of two years was given by ch. 36, sec. 155, to be computed from the 23rd of January, 1869, it was purposely intended to give to the former owners of such lands an extended period within which to prosecute their claims.

It appears to us that the Act just mentioned, when it gave to those who were interested in such lands a period of two years after the passing of the Act to prosecute their claims, gave to those whose rights were not then barred by any period of prescription the period of two years expressly allowed to them as the new and substituted limitation as fixed by the former act. The plaintiffs' contention in this respect is the one we support.

It was further contended by the plaintiffs that the description of the land on the roll and in the warrant as the N $\frac{1}{2}$  and W pt. S $\frac{1}{2}$  165 acres, or as the N $\frac{1}{2}$  100 and W pt S $\frac{1}{2}$ , 65 acres, were both of them irregular, and were not such a designation of the land by boundaries or in some other way by which it may be known.

The case of *Knaggs v. Ledyard*, 12 Grant 320, which was affirmed in appeal on the 25th of August, 1868, (a) sustains that objection. I was one of the affirming Judges in that case, but I have since, in the case of *Booth v. Girdwood*, ante p. 32, expressed my opinion that the judgment I then gave was not the one which I ought to have given, for that the west part of the south half of a lot containing 65

acres is a defined portion of land, namely the west 65 acres of a particular block of 100 acres.

Such a defect however would be cured by the 27 Vic. ch. 19 sec. 4, and by the 29-30 Vic. ch. 53 sec. 131.

I do not attach much consequence to that exception.

It was also objected that the treasurer had altered the roll for the year 1859 in the manner before stated.

The effect of his alteration was to give no description to the two parcels of land which he states as 35 and 165 acres, and to strike off one half of the whole taxes, and to rate each of these portions at just one half the sum at which they should have been rated.

The treasurer had authority to correct any palpable error on the roll: Consol. Stat. U. C. ch. 55 sec. 119. In correcting the roll so as to get the 35 acres separately assessed he did not mend matters, but the mere reduction of the charge to one half would not invalidate his act.

The want of description to the 35 acres and the 165 acres which he substituted for the original rating by half lots, was a defective and irregular act, but one which would be cured by the statutes before mentioned.

The result of the sheriff's sale is, that it is inoperative and void against the plaintiffs.

The remaining question is, as to the valuation of the land and of the improvements which the jury has made. The defendants contend that the plaintiffs cannot eject them until the plaintiffs have paid the defendants the value of these improvements as assessed by the jury.

The question arises under the Ontario Act 33 Vic. ch. 23, sec. 9. The enactment is that, "In all cases (not being within any of the exceptions and provisions of any of the four sub-sections to section one) where lands having been legally liable to be assessed for taxes have been heretofore, or may be hereafter, sold as for arrears of taxes, and such sale or the conveyance consequent thereon is invalid by reason of uncertain or insufficient designation or description of the lands assessed, sold, or conveyed. \* \* And in case an action of ejectment be brought against such tax purchaser, and he be liable to be ejected by reason of the invalidity



of such sale or conveyance," the Judge shall direct the jury to assess, &c.

The question is, Is this sale or the conveyance consequent thereon invalid "by reason of an uncertain or insufficient designation or description of the lands assessed, sold, or conveyed?"

In my opinion it is not. The invalidity arises from the causes before particularly mentioned, and so I think the enactment in question does not apply.

It is the defective proceedings with respect to the assessments for the year 1858 which invalidate the sheriff's sale of 1865, and which defects but for the decision of *Yokham v. Hall*, 15 Grant 335, I should have thought to have been cured and protected by the statutes before mentioned. The manifest intention of these acts was to support the title of the tax purchaser, and to make it final and binding in all cases in which the sale had been openly and fairly conducted—27 Vic. ch. 19, sec. 4; 29-30 Vic. ch. 53, sec. 131, and 32 Vic. ch. 36, sec. 130, O.; and not to preserve the rights of those who had neglected a public duty for so many years, and who had suffered the ultimate period of redemption to go by, "it being intended by this Act, that all owners of land shall be required to pay the arrears of taxes due thereon within the period of three years, or redeem the same within one year after the treasurer's sale thereof;" 29-30 Vic. ch. 53, sec. 131; 32 Vic. ch. 36, sec. 130, O.

The placing of the period of prescription in such cases at two years, after which the tax title becomes "to all intents and purposes binding, except as against the Crown," is another indication, as well as the general provisions of the Tax Title Act 33 Vic. ch. 23, that the purpose of legislation on this subject has been to maintain not to defeat the purchases at such sales, and to conclude not to defend the titles of owners, who must in almost every case allege their own wilful and culpable default whenever they impeach the validity of these sales.

For the reasons already given, the rule must be made absolute.

*Rule absolute.*

## PARKER V. MCQUESTEN.

*Bank Director—Fraudulent mis-statements—Action for.*

The plaintiff sued defendant as director of a bank, alleging in substance that, in a report made to the shareholders in 1866, and a statement accompanying it, the defendant falsely and fraudulently misrepresented the condition of the bank, over-estimating the assets and under-estimating the liabilities, thereby inducing defendant to believe it sound and to purchase stock. It appeared that the plaintiff, relying on these statements, purchased shares in 1867 at 92 to 95, which he sold at 39. In 1868 the credit of the bank became much impaired, owing, it was said, to the failure of other banks and of customers, and on an examination the capital was found to be reduced by \$300,000, and the reserve fund, and sum at the credit of profit and loss account, about \$70,000, swept away.

The cashier, who prepared the report and statements complained of, being called by the plaintiff, said these documents were correct, and he had no doubt defendant believed them to be so. As to certain Municipal debentures for \$118,000, bearing interest at 4 and  $4\frac{1}{2}$  per cent., which were placed among the assets at par, though of much less market value, he said they were regarded as so much of the capital invested at a low rate of interest, and the stockholders were so informed at the meeting in 1866. As to many of the assets said to be overvalued, he said he believed the sum reserved in 1866 to meet losses was fairly sufficient, and that the forced sales of property belonging to the bank, made after the examination in 1863, involved great sacrifices. Two of the persons who made that examination said that they thought some of the accounts should have been written off before 1868, but they could not say when or specify the amount, nor tell when the losses were made; another witness, the plaintiff's agent, pointed out several of such debts.

*Held*, 1. That there was no evidence of fraud sufficient to maintain the action,—that is, of false statements knowingly made by defendant with a fraudulent intent.

The nature of the fraud required to sustain such a charge considered, and the authorities reviewed.

2. That the report was not a representation within Consol. Stat. U. C., ch. 44, sec. 10, so as to require it to be signed by defendant.
3. That if the statements were false and fraudulent, defendant would be liable, although they were made to the stockholders, for they were intended and used for public information.

DECLARATION—First Count:—That the defendant was a director of the Gore bank, and intending to deceive and injure the plaintiff, and to induce him to believe that the bank was in a sound financial position, and the shares and stock thereof of great value and a safe investment for money, and to induce the plaintiff and others to become purchasers of shares at a greater price than their real value, falsely, fraudulently, and deceitfully published and

represented to the plaintiff and others, that certain profits arising out of the business for the financial year then past had been divided amongst the shareholders, and that two half-yearly dividends, at the rate of 7 per cent per annum, had been paid to the shareholders out of the profits of the last financial year; and in order more fully to deceive the plaintiff and others, the defendant fraudulently framed and contrived and published a report of the then alleged financial condition of the said bank, dated the 6th day of August, 1866, so as to misrepresent to the plaintiff the condition thereof, and to induce the plaintiff and others to believe that the said bank was then possessed of a large capital and large assets, and that its condition was sound and the profits sufficient for the payment of the said dividends, and that the shares therein were a safe investment for money; in which report, amongst other things, the defendant stated,\* that the profits of the bank for the then past year had amounted to a sum sufficient to enable the directors to pay the usual half-yearly dividends at the rate of seven per cent. per annum, to reserve \$20,000 to meet losses, and to add \$6,194 84 to the balance of profit and loss account, and which said report was accompanied by a statement of the alleged assets and liabilities of the said bank, at the close of its then last financial year.\* And the plaintiff says that by the said report, and by the said statement which accompanied it and was referred to in it, the defendant did in fact fraudulently misrepresent to the plaintiff the then financial condition and fraudulently concealed the true condition of the said bank, and thereby misled the plaintiff, and induced him to believe that the bank possessed a large capital and large assets, and that it was in a sound condition, and that the said profits were sufficient for the payment of the said dividends, and that the shares of the said bank were a safe investment for money, and that the statements in the said report, and the statement which accompanied the same, were true and correct. And the plaintiff says, that the said bank was at the date of the said report, and at the close of the financial year above

mentioned, not possessed of the amount of capital and assets mentioned in the said report, and in the statement accompanying the same, but of a much smaller amount of capital and assets, as the defendant well knew; and, further, that the condition of the said bank was not sound, and that the shares thereof were not a safe investment for money, and that the profits of the bank for the past year had not amounted to \* a sum sufficient to enable the directors to pay the said dividends, and to reserve the said sum to meet losses, and to add the said sum to the profit and loss account. And the plaintiff further says, that the said statement which accompanied the said report did not contain a true account of the assets and liabilities of the said bank at the close of its then last financial year, but, on the contrary, the assets of the said bank were greatly over-estimated, and its liabilities greatly under-estimated, in the said statement, of all which premises the defendant, when he made and published the said report, was well aware,—by reason of which false and fraudulent representations and publication the plaintiff, relying on the same, was induced to buy, and did buy, through and in the name of George Taylor, her attorney and agent, thirty-eight of the said shares of the said bank, whereby the plaintiff lost the price of the said shares.

The second count was similar to the first, but referring to the report of the directors, dated 5th August, 1867, and setting out, after the asterisk, the words and figures following: "By the statement now presented it will be seen that the net profits of the bank during the period mentioned have amounted to \$80,992 75. Deducting from this amount the two semi-annual dividends paid in January and July last, and the amount paid to Government for tax on the Bank's circulation, there will remain a balance of \$23,504 34 to be added to the amount of credit of profit and loss account on 30th June, 1866, making the amount at the credit of that account, at 30th June last, \$77,469. This amount is applicable to losses on over-due debts. The Rest remains unaltered at \$75,000." The allegations then fol-



lowed the same as in the first count, from the second \* to the third \*, and then proceeded "the sum of \$80,992 75, nor to add the said sum to the profit and loss account"; concluding as in the first count, save that it alleged the purchase of twelve shares instead of thirty-eight, and that the plaintiff became liable to contribute to the losses of the said bank, whereby the plaintiff lost the price of her said shares.

*Plea*—Not guilty.

The cause was tried before *Morrison, J.*, at Hamilton, at the Fall Assizes of 1869. The material facts of the case were, that the plaintiff, through her agent, George Taylor, became the purchaser of thirteen shares of the stock of the Gore bank, on the 6th June, 1867, at 95 per cent., on the 7th June thirteen more at 95½, and twelve shares on the 18th September, at 92½ per cent. The par value of each share was \$40. He, Mr. Taylor, based his purchase on the report of the directors and the statement of the affairs of the bank made in 1866. He thought the purchase of twelve shares in September, 1867, was made on the faith of the report and statement of 1867. She sold the stock at 39—61 per cent. discount—incurring a loss in the purchase and sale of the stock of \$1,123 00. On cross-examination Mr. Taylor said he bought the stock on the faith of the report of 1866.

The report of the directors of the bank was made at a meeting of the shareholders held on the 6th of August, and shewed the state of the affairs of the bank on the 6th of June of that year. The defendant, who was then, and had been for several years before that, Vice-President of the bank, was in the chair. The report stated that, by the balance sheet annexed to the report, the profits of the bank for the year, after deducting expenses of management, &c., amounted to \$83,392 58, which enabled the directors to pay the usual half-yearly dividends at the rate of 7 per cent per annum, to reserve \$20,000 to meet losses, and to add \$6,194 00 to the balance of profit and loss account, which account amounted to \$53,964 77. The Rest amounted, as previously, to \$75,000.

The profit and loss account for the year shewed :—

Balance at the credit of this account, 30th June, 1865,.....	\$47,799 93
Net profits for the year ending 30th June, 1866, after deducting expenses of management, .....	83,392 58
	<hr/>
	\$131,162 51

From this amount the following appropriations have been made :—

Dividend No. 55, January, 1866, \$28,208 60	
“ “ 56, July, 1866, 28,324 80	
Reserve to meet bad and doubtful debts.....	20,000 00
Tax on circulation .....	664 34
	<hr/>
	77,197 74
	<hr/>
Balance, as per General Statement....	\$53,964 77

In the general statement of the affairs of the Gore bank, as on 30th June, 1866 :—

LIABILITIES.		ASSETS.	
Capital.....	\$809,280 00	Gold and silver coin..	\$587,708 50
Circulation.....	660,127 00	Cheques and notes of	
Deposits.....	1,088,425 83	other banks.....	51,362 89
Balances due other banks.....	5,940 08	Balance due by other banks.....	189,618 08
Dividend, July, 1866..	28,324 80	Government and Municipal debentures....	201,533 33
Rest.....	75,000 00	Mortgages.....	50,812 07
Profit and loss, Balance	53,964 77	Real estate.....	60,500 72
Reserve for bad and doubtful debts.....	20,000 00	Bank premises, and furniture at head office and branches	22,923 04
		Notes and bills discounted, and other debts due to the bank, not included under the foregoing heads.....	1,576,603 85
	<hr/>		<hr/>
	\$2,741,062 48		\$2,741,062 48

The Report was signed by T. C. Street, Esquire, President of the bank, and the general statement by W. G. Cassels, Cashier.

The statement for the year 1867 did not differ materially from that of 1866, save that the net profits of the bank

were not so great by the sum of about \$2,400, and there was no reserve to meet bad and doubtful debts, but \$23,504 34 was added to the credit of profit and loss, instead of \$6,194 84 as in the report of 1866, leaving to the credit of that account \$77,469 11 applicable to losses on overdue debts, instead of \$53,964 77 as in the former statement. The rest, \$75,000, remained the same in both statements.

The assets under most of the heads were less than in the former statement; Government and Municipal debentures the same; bank premises at head office and branches somewhat increased in amount, about \$1,200 or \$1,300; notes discounted increased over \$100,000. The circulation had diminished over \$100,000, the deposits about \$20,000.

In 1868 the credit of the bank became very much impaired, owing to the failure of the Bank of Upper Canada, of the Commercial Bank, and of merchants largely indebted to the bank. This necessitated the borrowing of money from other banks, and the sale of property and securities. During the year \$60,742 67 were written off as bad debts, and in their statement the directors stated a probability of reduction in value of assets from various causes to the amount of \$222,570 07. A change of directors then took place. A committee was appointed to value the assets of the bank, and they reported that there only remained to the credit of the capital of the bank about \$500,479 87, shewing the capital reduced by losses, &c., over \$300,000.

Mr. Cassels, the cashier, who prepared the statements of 1866 and 1867, was examined at great length touching the different items and accounts included in the assets, with a view of shewing that many of the accounts then included in the bank statement as assets ought to have been partially or entirely written off long before 1866 or 1867, and the keeping them in the statement as part of the assets of the bank was calculated to deceive any person who read the statements, and that the defendant as one of the directors of the bank knew this course was being pursued, and consequently these statements were false in fact, and calculated to deceive.

He said, under date 30th June, 1866, they wrote off \$19,240, which were all the bad debts they had in fact ascertained at that time, and \$20,000 in the statement of that year was set apart to cover that. When the half-yearly dividend was declared in 1866, they had all the capital, \$809,280, intact, and the rest of \$75,000, as stated in the report, which the public were expected to believe. The \$19,240 was written off after August, 1866, and before August, 1867, they wrote off no other bad debts. There were \$77,469 appropriated to meet bad debts. The reserve of \$75,000 was still kept, and they paid a dividend as well, and wrote off \$67,000 bad debts before the dividend was declared and paid, and the state of the bank warranted the payment of the dividend. In June, 1866, there was in all about \$189,000 of overdue paper, and \$1,330,000 paper current. The bank held Municipal debentures of the City of Hamilton amounting to \$118,000, bearing interest at 4 and  $4\frac{1}{2}$  per cent., which appeared at the face in the statement of assets in 1868; the value of the 4 per cent. debentures for sale was about 65c. on the dollar, and the  $4\frac{1}{2}$  70c. In 1866 they were worth 60c. to 64c. In the report of 1866 they appeared as they stood in the bank books, but the stockholders were told that the debentures were looked upon as a part of their capital invested at a low rate of interest. These debentures appeared in the report as an asset beyond the market value, all of which the directors well knew.

On the 13th June, 1868, the directors made an examination of the affairs of the bank, arising from the failure of the Commercial Bank, in September, 1867, and of a large mercantile firm in Hamilton. Loans were obtained from the Bank of Montreal and other Banks. W. W. Street's account of \$12,062, was \$13,609 in 1862. The bank had a life policy as a security, amounting to £2,000. In 1866, the policy was worth \$2,000, if then surrendered: that account was carried in as an asset for \$10,000 too much, in June, 1866. In January, 1862, there was a claim against one Lucas, for \$15,800. It was placed in Mr. Becher's hands before 1862. The account was reduced to \$4,991, in June,



1866. It was valued in 1868, as an asset, at \$150. In 1866, witness was not aware of the value of the land which was held as a security for Lucas's debt. In 1866 and 1868 the bank premises were the same value. They were valued at \$12,000 in 1868, but witness thought they were worth then \$24,000.

The Bank of Upper Canada failed in June, 1866. The Gore Bank held an unsecured claim against them for \$81,000. Their bills were taken for \$50,000, and certificates of deposit for the balance. The bank wrote off of this claim \$2,649, in 1867-68. The new directors, who came in in 1868, sold the certificates at 65. The witness thought they were worth their face.

The Bank had a claim against one Puleston, for which they held six lots in Hamilton, as security for \$4,000; three of the lots were sold in 1857 for \$2,000; the other three were held in June, 1867. They were sold after the witness left the bank, for \$800. The property mentioned in the report as real estate was land that had been taken absolutely by the bank. The property in Owen Sound was valued at \$1,600, in March, 1867. The Sarnia property was taken in June, 1862, for \$3,000, and part sold for \$1,000, and some remained unsold. The East Zorra property was sold in January, 1866, or before that, and \$657 remained to the debit of the place. It was to be written off as bad, but was included in the assets of 1866 and 1867. The Preston property, taken from Mr. Ferrie at \$2,000, was sold in 1867 at \$750; it was entered, balance to be written off. Ferrie's property in Hamilton was considered worth \$20,000, but sold in September, 1868, at \$9,000. Witness thought it worth more; and in 1862 and 1863, the bank were offered \$14,000 for it. The place cost much more.

The Wellington Square property was taken at \$10,000, in payment, in January, 1865, from Mr. Baxter, who owed the bank about \$20,000. He gave other property, and notes for \$7,000, which were paid. In October, 1868, the new directors sold the property taken at \$10,000,

for \$5,000. The bank leased the property, and had it for sale.

The House property, which was taken at \$2,000, was sold for \$800, and the \$1,200 was to be written off. The Milton property was sold in 1868, at a loss of \$1,400. On the Morriston property, \$1,800 was due in June, 1868. The original amount was \$3,000, and \$1,400 was sold off. The balance of the property was sold by the new directors. The bank got it in 1865. The Embro property was acquired in 1865, at \$2,000, and sold in March, 1866, for \$775; \$1,225 was to be written off, and it was to that extent no value in June, 1866. The Mersea property, acquired in June, 1867, by foreclosure, was taken at \$3,000, from Ferrie; part was sold for \$1,000, in May, 1868, the balance remains. Witness said he assumed the lands were taken on the representation of the directors, and of Mr. Ferrie, and witness thought it extremely probable they knew the value of the lands in many instances. Pooley's bills, \$5,000, were discounted at Guelph, in July, 1862; Newman & Co. of New York, were on the bill. Nothing has been paid since 1863. It is carried in as an asset. On Alexander Proudfoot's notes, they got \$500 in 1862, nothing since; but they recovered judgment. \$2,988 was written off in 1865. It was of the same value in 1866; something may be recovered. Whitney's debt, \$1,585, due in October, 1863, was secured by a policy, the value of which, on surrender, was \$300. J. C. Rykert's note, endorsed by Kingsmill, was secured by policy on Kingsmill's life. Witness thought the debt good. A. M. Clark's note, endorsed by Kingsmill, was in the same position. Kingsmill's debt for \$1,000, was still in the solicitors' hands.

McIntyre's account commenced before 1862. It was then about \$100,000, on customers' paper; at his death, in 1866, it was about \$84,000, in notes. Many were renewals, perhaps half of them. It turned out after his death many of the notes were accommodation paper. In June, 1868, a great deal was paid; witness could not say what was paid in 1867. He thought the account was too large, and some

names were weak. McIntyre always asserted, in 1865 and 1866, that he had plenty of means to pay all. There would be a loss of \$20,000 on that account. As to the Woodstock branch, he said: Fawsett and Washburn's was an old account for \$14,000; nothing paid on it. They had security from Mr. DeBlaquiere for that and other liabilities. Nothing was paid on the account during witness's time. The new directors made some arrangement with DeBlaquiere for the amount. The bank held securities of various kinds. The amount of his account altogether, was between \$80,000 and \$90,000. McWhirter and White's account was about \$18,000. It was a very active one for a long time. It became bad owing to the insolvency of the parties in 1867; witness could not say at what time. He did not think that the account was yet bad. Josiah Campbell's debt, \$2,000, was in the solicitor's hands; witness did not know it was bad.

The foregoing items were debts referred to in the estimate of the directors, in 1868.

From time to time statements of the general balances were placed before the directors; once a fortnight. Mr. Mills purchased the Ferrie property at \$9,000, and the sale was assented to by the shareholders. In 1866 and 1867, the directors held \$186,000 of stock for themselves, and \$32,000 for their friends. The Hon. Mr. Mills purchased stock in 1866 and 1867. During that period none of the directors sold any stock.

The profits stated in the report of 1866 were made out of the business of that year. They arose fairly and properly, and were not paid out of the capital, and the dividends were made out of the profits; and the same in 1867.

The statement of 30th June, 1866, shewing the liabilities and assets of the bank, was prepared by the witness as cashier, and laid before the directors, as shewing the position of the bank, and was made from the books. The statements of the assets were made in the usual way that such statements are made for the directors of banks; the value of the particular asset is never made; witness said



he did not know that it was ever done in any public company; that the statement, to the best of his knowledge, was a correct statement and an exact one, from the books of the bank, and the balances in the books. The report was not intended to give a value to the assets of the bank, and it was so understood. It was a true and correct statement, to the best of his knowledge and belief, and the statements of 1866 and 1867 were equally correct and true in every particular. Questions were asked at the meeting of 1866 and 1867; and as to the Hamilton debentures, it was explained as being so much of the capital of the Bank invested at 4 and  $4\frac{1}{2}$  per cent interest. It was so explained on a question being put. Questions were also put as to the value of the real estate.

He thought the defendant had every reason to believe at the adoption of the reports that they were correct, and that he believed them to be so, and witness knew them to be so. The subsequent estimate of the value of the assets had nothing to do with the reports in 1866-67. The large obligations of McIntyre & Co., Buchanan & Co., and the Bank of Upper Canada, became bad after 1866 by the insolvency of the parties.

All the statements were prepared by the witness as the head of the executive of the bank and laid before the directors, and he had no reason to think they were not correct. The reserves of 1866 and 1867 were made and set apart for the paying of these.

He thought there were losses in 1866, and the practice is to carry the amount over the dividend to meet losses or debts written off. Witness could not state what the losses were in 1866 and 1867. In that year \$77,000 was reserved to meet losses. The statements were truthful in 1867. He believed the assets taken at their fair value, with the rest and reserved profits, were quite sufficient to meet every liability, and keep the capital intact. He said it was his duty to present the statements made in the reports of 1866 and 1867, and lay them before the directors. They knew that the items and balances appeared in the books. He



accounted for the way in which the bank was disposed of to the other bank,—that the new directors forced a sale of the securities, &c., and made large losses, such as the De Blaquiere account and others.. The sale was at 57 per cent.

Mr. Willson and Mr. Findlay, two of the parties appointed by the stockholders in 1868, with Mr. Taylor, to inquire into the state of the bank, were also examined. They found the capital of the bank impaired to the extent of \$315,000, after paying old liabilities. They did not inquire into the state of the bank at any time prior, but put their own value on the assets on the 31st August, 1868. They made inquiry as to the value of the lands, and made the valuation so that they ought to be sold to be paid for in a few years. As to all the assets they exercised their best discretion: *i. e.*, when they found a debt that would not be paid for some time they valued it at so much less. If the debt was good, and not due, they rebated the interest on the note or bill. Hamilton debentures were worth  $37\frac{1}{2}$  in 1866. Mr. Willson said there were some accounts which they thought might have been written off before 1868, but could not say the amount or when. He could not fix a date when the losses were made. He thought part of the Ferrie property should have been written off before then. It was not their duty to say what debts might have been written off, or at what time, or when the losses were made.

Mr. Taylor, the plaintiff's agent, who bought the shares for her, was also examined. He was one of the committee appointed by the stockholders to report on the affairs of the bank. He stated that he based his value of the stock on the annual statement and report of the bank in 1866 and 1867. The statement, he said, shewed the bank in a peculiarly safe and sound condition. He had been in a bank twenty-five years. He said a financial statement should shew the true value of the assets of the bank. He would not, assuredly, have bought the stock if he had known the true state of the bank, and he was deceived by the statements and reports published by the directors. As to

the debts due the bank, he thought some of the debts should have been written off long ago. The report of 1866 deceived him, and it was calculated to deceive any business man. The whole report went to shew a most prosperous bank. He bought the stock at the market value, and sold it at 39 per cent., 61 per cent. discount. He sold the stock fearing he might lose more if he did not sell. He said in the Bank of British North America the assets were valued half-yearly. He could not say how their statements were made out, as he had never been at head quarters, but he believed they annually set out the true state of their affairs, making allowances for all bad debts. The debt of W. W. Street ought to have been written off long before. The life policies were the only assets. He did not think all the amount set out in the item "Bills discounted" would be recovered. He relied on the statement, and concluded the reserve was sufficient to meet any losses. The bank premises he thought not correctly stated in value. He thought \$12,000 ample. The Puleston debt \$2,000, the Sarnia \$2,000, the Zorra debt \$1,650, should have been written off. The Preston property and the Ferrie property were valued at too high a price. For all these items ample allowance should have been made years ago, and the same with Pooley, \$5,000, and Proudfoot \$29,870. The loss the plaintiff suffered by the purchase of the stock was \$1,123 $\frac{00}{100}$ .

*J. H. Cameron*, Q. C., for defendant, moved for a non-suit, objecting:

1. There was no statement signed by the defendant under the statute, so as to make him liable.

2. The plaintiff having sold the stock no right of action could arise.

3. There is no evidence that the defendant knew, or any one else, that plaintiff desired to purchase any stock, or that she did so purchase: that on the merits, the plaintiff by her own witness, Cassels, shews the report to be *bonâ fide*, and that there is not the slightest evidence from which the

jury could infer any fraudulent or other representation made by the defendant.

*Freeman*, Q. C., for the plaintiff, contended that a case in point of law was established against the defendant, and that notwithstanding the opinion of the witness Cassels, it was for the jury to say, under all the circumstances, whether the report was a truthful one or not.

The learned Judge ruled that the plaintiff had not made out a case to go to the jury, as the plaintiff's witness swore to the truth and *bona fides* of every statement and particular in the report in question. He did not think the defendant was liable in this action for not protesting against the contents of an annual report of the affairs of the bank made to the stockholders, and for their information, and subject to their approval, the statements contained in such reports being vouched for at the time by the proper officers of the bank and their books, and in the absence of the slightest evidence of any representation to the plaintiff to induce her to purchase the stock, or any knowledge that she was at any time an intending purchaser.

In deference to the opinion of the learned Judge, the plaintiff took a nonsuit.

In Michaelmas term, 1869, *Freeman*, Q. C., obtained a rule *nisi* to set aside the nonsuit, and for a new trial, on the ground that the evidence shewed falsehood and fraud contained in the report of the directors of the Gore bank, for which the defendant was responsible to the plaintiff, in improperly and falsely overvaluing and stating the assets of the bank to meet liabilities of the bank, whereby the plaintiff was deceived, as in the declaration mentioned, which evidence should have been submitted to the jury.

The rule was enlarged from time to time until Easter term, 1870, when,

*J. H. Cameron*, Q. C., and *M. C. Cameron*, Q. C., for defendant, shewed cause. The witness, the cashier, made the statement in good faith. It was correct as taken from the books, and defendant acted on it in good faith, and he cannot therefore be made liable in this action: *Jackson v.*

*Turquand*, L. R. 4 E. & Ir. App. 305. What was published was the report of the directors to the stockholders, and it was ordered to be printed by them. It is not like a prospectus sent to others to induce them to take stock. The report was not signed by the defendant. The Stat. 9 Geo. IV. ch. 14, sec. 6, similar to our Consol. Stat. U. C. ch. 44, sec. 10, to make a defendant liable requires these representations to be in writing: *Devaux et al. v. Steinkeller*, 6 Bing. N. C. 84. The act refers to persons, and corporations are within it: *Boyd v. Corydon R. W. Co.*, 4 Bing. N. C. 669. To make the action lie at all, the deceit must be wilful: *Ormrod v. Huth*, 14 M. & W. 651; *Add. T.* 860, and cases there cited.

*Freeman*, Q. C., in support of the rule. The Gore bank charter, 23 Vic. ch. 116, secs. 16 and 17, requires the directors to make a true statement of the affairs of the bank, and provides that no dividends shall be made so as to impair the capital of the bank: *Pulsford v. Richards*, 17 Beav. 94. They say they wrote off \$19,000, which was the amount of all they actually ascertained to be bad; but until a debt was hopelessly bad they considered it good. If a bank cannot pay a dividend it may as well close its doors, and that is the motive for making a false statement. In the report following June, 1866, no bad debts were written off. The statement shewed the bank was warranted in making the dividend, and in consequence the plaintiff became a shareholder, which she was not before that time. The distinct item complained of is the \$118,000 of Hamilton debentures. At that time they were only worth 62 cents on the dollar; they were put in at par, including interest, which made the amount \$118,000. They only bore interest at  $4\frac{1}{2}$  per cent. and the par value was only 70 cents on the dollar. The debentures were entered at \$37,000 more than they were worth in the market.

There is abundant evidence that the report of 1866 contained gross misrepresentations, and the defendant must have known that many of the debts mentioned as assets in the report of 1868 were hopelessly bad debts when the



report of 1866 was made. He cited *Smith v. Clench*, 4 F. & F. 578; *Evans v. Edmonds*, 13 C. B. 777; *Milne v. Marwood*, 15 C. B. 781; *Bedford v. Bagshaw*, 29 L. J. Ex. 59; *Scott v. Dixon*, *Ib.* 62, note; *Clarke v. Dickson*, 6 C. B. N. S. 453; *Cullen v. Thomson's Trustees*, 4 Macq. H. L. Cas. 424, S. C. 6 L. T. N. S. 874; *Davidson v. Tulloch*, 2 L. T. N. S. 97; *Jackson v. Turquand*, L. R. 4 E. & I. App. 305, per Lord Hatherley, C. and Lord Westbury.

RICHARDS, C. J.—I do not think sec. 10 of Consol. Stat. U. C. ch. 44, similar to sec. 6 of the Imperial Statute, 9 Geo. IV. ch. 14 sec. 6 applies to this case. That section only applies to the case of a party misrepresenting the credit or standing of another to the intent that such person may obtain money, goods, or credit thereupon. Here there was no intent by the representation complained of to enable the bank to obtain money or credit. The false representation, if any, was to enable those who held the stock of the bank to dispose of it. The bank itself had no stock to dispose of, and at the time the report was made was not borrowing money, and the plaintiff did not wish to lend them any. I do not think the section referred to by Mr. Cameron applies, and in the absence of any reference to such a point in any of the decided cases, I think we will be safe in assuming that the statute does not apply.

In *Scott v. Dixon*, 29 L. J. Ex. 62, *note*, and in the additional cases to the American Edition of 1 E. & E., p. 1099, it is stated in the head note that the directors of a corporation are personally liable for false representations contained in a report to the shareholders, on the faith of which the plaintiff has bought stock. Lord Campbell said, in giving judgment, "Reports of joint-stock companies, though addressed to the shareholders, are generally meant for the information of all who are likely to have dealings with the company, and I have no doubt that the directors in the present case knew that this particular report would, a few hours after its publication, be in the hands of all share-brokers in Liverpool, and that it would be acted on by those who had or wished to have dealings with the bank."

*Wightman*, J., said, "This was a document meant for general purposes, for it was to be obtained by any one, and the plaintiffs themselves, on receiving the report from a shareholder, were induced to make the purchase.

*Crompton*, J., said, "When a matter of this kind is published it is sure to be read, and the publisher must know that it will be used, and this brings the publisher within the compass of the law applicable to this subject."

*Hill*, J., said, "As to the representation having been made to the plaintiffs, there is no doubt on the facts that, although the report was primarily a report to the shareholders, yet the directors (who desired that the shares should maintain a good price in the market) intended it for the information of every person who was disposed to deal in shares, and any person who was so minded, according to the ordinary practice of the bank, might obtain that report at the bank, and the representation contained in that report was a representation made to the person so obtaining the report."

Here the evidence of Mr. Cassels shewed that the report was published in the newspapers by order of the directors, and they therefore intended it for the information of every one who was disposed to deal in shares who might read it. The plaintiff's agent did read it, and dealt in the shares to her prejudice, and therefore, as far as this point of the case is concerned, it was a representation made to her.

I had occasion to consider a somewhat analogous question to this in *Holton v. Sanson et al.*, in the Court of Common Pleas. It is reported in 11 C. P. 606, and at p. 615 I had occasion to refer to *Scott v. Dixon*, as also to *Bedford v. Bagshaw*, 4 H. & N. 538, and I quoted the opinions of the learned Judges of both Courts at some length. In the latter case Baron Bramwell said: "It is not a bad rule, that a person who makes a fraudulent representation, which is intended to be generally circulated, shall be liable to any person injured by acting upon it, however remote the consequences may be."

Martin, Baron, said that he thought that case con-

cluded by the proceedings in the Exchequer Chamber in *Seymour v. Bagshaw*, 18 C. B. 903, and that case was affirmed in the House of Lords. The judgment is reported in 32 L. T. Rep. 81, and in 4 C. B. N. S. 873. In the House of Lords the following reason was given by defendant in error for supporting the judgment: "Because a false and fraudulent representation made by A. to the public, calculated and intended to deceive by inducing persons to purchase for value that which is worthless, affords a ground of action against A. to any person who is deceived, and who purchases and suffers damage thereby, in the same manner and to the same extent as if the representation had been made directly by A. to such person."

On the case being called on in the House of Lords, the counsel for the plaintiff in error said that he did not think he could usefully occupy the time of the House by arguing it, and would at once submit to a judgment for the defendant in error.

I think reason and authority concur in shewing that the action can be maintained by the plaintiff as a person injured, against the defendant as one of the directors concurring in the report and in publishing it and the statement of the officers of the bank, if it is satisfactorily shewn that the statements were false and fraudulent, and that the defendant knew they were false, and with the other directors fraudulently authorized them to be made and published.

The evidence to shew that the reports and statements of the affairs of the bank in 1866 and 1867 were false and fraudulent is, that in 1868 a committee appointed by the directors reported that the reserve and amount at the credit side of profit and loss had all been swept away, and \$300,000 odd of the capital of the bank trenched upon, and the real capital of the bank reduced from \$809,280 to \$500,479 87; and that the report of this committee was adopted by the directors, of whom the defendant was one. Although two of the members of that committee were not prepared to state when the losses were incurred, and what

portion of the assets should have been written off as bad or reduced prior to 1866 and 1867, yet Mr. Taylor stated a number of accounts that were then worthless, and ought to have been written off, and Mr. Wilson stated that part of the Ferrie property should have been written off before then.

Mr. Taylor, in his evidence, referred to the debt of Mr. W. W. Street (\$10,000), which should have been written off, save the value of the life policy. The bank premises he thought not correctly valued, the excess being \$12,000. The Puleston debt, \$2000; the Sarnia property, \$2000; the Preston property; and the Ferrie property, valued at too high a price; Pooley \$5,000, and Proudfoot \$29,870,—for all these claims ample allowance should have been made years ago. These amounts, as far as I can gather, make up a sum of about \$73,120.

In reference to these items, I understand Mr. Cassels to say the bank held a policy of assurance on Mr. Street's life for £2,000. If compelled to sell, it would produce \$2,000; but I should think it would as an investment be worth more than that. Would an insurance company grant a policy on Mr. Street's life for £2000 for \$2,000? The bank premises, Mr. Cassels says, were worth, in his judgment, \$24,000. There were some of the lots taken for Puleston's debt which appear not to have been sold, which might reduce that amount. The Ferrie property sold for \$9,000. Mr. Cassels says they were offered \$14,000 for it: that he thought it was worth more,—that it cost over \$20,000. As to the claim against Proudfoot, it was in a judgment, and he thought it worth something. The Rest in 1866 was \$75,000. A reserve for bad and doubtful debts, \$20,000, besides \$53,964 77 to the credit of profit and loss.

The principal item, however, which Mr. Freeman pressed in his argument was the Hamilton debentures. Of these the bank held \$118,800, bearing interest at 4 and 4½ per cent. These were put down in the statement at the par value, whereas the market value was less than \$77,831, making over \$40,000 appear to the credit of the bank as



an asset more than ought to have been shewn, on these debentures alone. The defendant and all the directors were aware of this, and they all concurred in this false and fraudulent statement.

Mr. Cassells states, that at the meeting in 1866 reference was made to these debentures, and it was explained that though only drawing 4 and  $4\frac{1}{2}$  per cent. interest, they were entered in the statement at par: that they could not be looked on as an available asset to the amount of the face, but that they were looked upon as a part of the capital at a low rate of interest.

If, from the circumstances of the country, the rate of interest should decline to 4 or  $4\frac{1}{2}$  per cent., then I suppose these debentures would be worth par. If the bank had become the owner of Municipal debentures, which in consequence of the plentifulness of money should be above par, then the statement should so include them.

I fail to see the evidence of *fraud* in stating the face of these debentures at par in their statement under the circumstances. Every year that they kept them would increase their value, if the current rate of interest remained the same. The value would be increased each year, because as the time for their redemption approached the time that the bank would get the face of the debentures lessened.

No doubt, if a strict and exact statement was required to be made of any asset and its value, and the price it would realize if thrown into the market and a sale forced, these debentures, and probably many of the properties of the bank, as well as debts, were estimated too high. But considering the Rest, the sums put to credit of profit and loss, which the cashier said were for the purpose of covering any of these losses or under-estimates, is there evidence to go to the jury of false statements knowingly made with a fraudulent intent by this defendant? Is there evidence to go to the jury that the cashier and the directors of the bank made up this statement and published it to the world with the intention to cheat and defraud parties who might

feel inclined to buy bank stock,—in fact, to induce parties to pay a high price for shares in this bank, when they knew and believed at the time that it was not only not in a position to pay the dividend they were declaring, but that the capital of the bank itself had been considerably impaired ?

It can hardly be supposed that any one who read the statement and report would be of opinion that all the assests of the bank could or would be realized at the value put down, for in that case, according to the statement of 1866, not only would the entire capital of the bank be intact, but there would be \$75,000 of a rest, and \$53,000 to the credit of profit and loss, besides the \$20,000 reserved for bad debts. This, with the large deposits of the bank, would make the market value of the stock, I should think, more than  $92\frac{1}{2}$  or 95. I should suppose that every one would consider that all the assests would not be realized at the estimated value. Mr. Taylor, the plaintiff's agent, resided at Hamilton, and could have applied to the bank for information as to these debentures, whether they were put down at the face value or not, and whether any bad debts had been written off.

The fact that the bank suffered largely by the failures of the Bank of Upper Canada, McIntyre & Co., Buchanan & Co., and by the apparently forced sale of some of their assets, cannot now fairly be pressed against this defendant, that he was acting fraudently in 1866 in joining in the report.

The general doctrine seems to be settled at law, that when a charge of fraud is made "it ought not to be left to mere suspicion, suggestion, or surmise ; there ought to be clear proof of fraud" : per Pollock, C.B., in *Gray v. Collins*, 4 F. & F. 311.

In the head note to *Bale v. Cleland*, 4 F. & F. 117, amongst other things, it is stated to have been held that "any error in the mere mode of keeping the accounts would not be evidence of fraudulent representation ; the falsification of facts and figures was so, as against any of the defendants

who were aware of the issue of the prospectus, but *seem*, not against those who merely had the *means* of knowledge."

At the close of the case Lush, for the prosecution, conceded that as to the three last-named of the defendants there was no case, as there was no evidence of actual knowledge by them of the alleged fraud,—*i. e.*, of the falsehood of the representations relied on. In a note to the case it is stated, "All the defendants received reports from and were constantly at the works, and knew or had the means of knowing the real facts. They were all present at the dividend meeting, and *silently assented*. But there was no evidence of actual knowledge by the three last-named defendants." There is a note at p. 133 which gives the following statement of the law on the subject: "There must either be actual knowledge of the falsehood of the representations, *or* a fraudulent mind and motive; that is, an intention to deceive and defraud, and an entire indifference to the truth or falsehood: *Taylor v. Ashton*, 11 M. & W. 401; *Shrewsbury v. Blount*, 2 M. & G. 475; *Collins v. Evans*, 5 Q. B. 820; *Gerhard v. Bates*, 2 E. & B. 476 . . . In order to maintain the action it is not necessary that there should have been a direct personal representation by the defendant to the plaintiff; it is sufficient if he authorized the circulation of a prospectus to the public, knowing it to contain false statements; *Clarke v. Dickson*, 6 C. B. N. S. 453. *Evidence* of actual knowledge, of course, need not be express, but may be implied from the facts."

*Taylor v. Ashton*, 11 M. & W. 401, was an action brought against directors of a bank by a person purchasing stock on the faith of the report of the directors as to the flourishing condition of the bank, which report was in fact false. It was contended for the plaintiff that the true rule of law was, "that wherever one party makes a false representation to another, with the view of inducing him to do a particular act, with a view to his own benefit, and the other does the act and suffers a detriment thereby, a cause of action accrues, without proof that the representation was



false within the knowledge of the party making it,—especially when he has all the means of information, and the other party has none.” Parke, B., said: “I adhere to the doctrine that an action for deceit will not lie without proof of moral fraud; and Lord Denman, in *Fuller v. Wilson*, 2 G. & D. 460, seems to admit that to be so. If the party *bonâ fide* believes the representation he made to be true, though he may not *know* it, it is not actionable.” Again, he said: “There may undoubtedly be a fraudulent representation, if made dishonestly, of that which the party does not know to be untrue, if he does not know it to be true. . . . The representation must have been *fraudulent* in order to render the defendants liable.” In giving judgment he said, “Independently of any contract between the parties, no one can be made responsible for a representation of this kind, unless it be *fraudulently made*. . . . But then it was said that, in order to constitute that fraud, it was not necessary to shew that the defendants *knew* the fact they stated to be untrue; that it was enough that the fact *was* untrue, if they communicated that fact for a deceitful purpose; and to that proposition the court is prepared to assent. It is not necessary to shew that the defendants knew the fact to be untrue; if they stated a fact which was untrue for a fraudulent purpose, they at the same time *not believing* that fact to be true, in that case it would be both a legal and moral fraud.” In referring to the evidence he said, “This report was not prepared by the defendants themselves—the directors; it was prepared by some of the officers of the company, and afterwards adopted by the directors, having been read at a meeting at which they were present. The question for the jury was, was that a fraudulent report, and were the defendants parties to that fraud?”

In *Thom v. Bigland*, 8 Ex. 731, Parke, B., said, “It is settled law that, independently of duty, no action will lie for a misrepresentation unless the party making it knows it to be untrue, and makes it with intention to induce another to act on the faith of it, and to alter his position to his



damage. This appears from the cases of *Evans v. Collins*, 5 Q. B. 820, and *Ormrod v. Huth*, 14 M. & W. 651, which have perfectly settled the law on that point."

In *Shrewsbury v. Blount*, 2 M. & G. 499, reference is made to the charge of the Judge on the trial of the cause, and he is represented to have said, "that the statements made by the defendants shewed great want of caution, but that the question for the consideration of the jury was, whether their statements were made fraudulently. That if the defendants had brought their own shares into the market, there would have been some ground for suspecting that the representations had been made with a view to their own advantage; but there was no evidence of any shares being sold except by Harrison, and he had bought more than he sold."

In *Jackson v. Turquand*, L. R. 4 E. & I. App. 309, Lord Hatherley said: "We find nothing whatever upon the evidence before us to satisfy us that any misrepresentation whatever was made by the directors, or if it was so made, that it was made to their knowledge, or with such a degree of carelessness and negligence on their part in inspecting the accounts and concerns of the company as to amount to a necessary implication of knowledge on their part of the representations being false. All that we have before us is this, that they did make a very flourishing report of the state of the accounts. It is said, and it is admitted, that there were certain debts which were assumed, before the representation was made, to be good, and which now have turned out to be bad. Not one word is told us, nor any suggestion made, as to the directors having any knowledge whatever of the debts, which were reckoned to be good at the time when the representations were made, being bad."

Lord Westbury said: "It was contended by Sir Roundell Palmer that the circular offering the new shares at £15 premium, involved a representation that the company was in a flourishing condition. Probably it would be too strong, in order to charge parties with fraud, to derive that conclusion from such a representation; but if it admitted of

being so derived, there is nothing whatever in this case to shew that the parties who made such a representation knew, or ought to have known, that it was false. There has been nothing suggested as shewing anything like *malus animus*, or anything like neglect in ascertaining what they represented to be the fact."

In *Moore v. Burke et al.*, 4 F. & F. 278, reference is made to the dictum of Mr. Justice Maule, "to the effect that if a man, having no knowledge of the facts, represents them in a certain way, and for a certain purpose, and they are falsely represented, he is guilty of fraudulent representation, as much as if he knew their falsehood." Cockburn, C. J., said that this was not so, if the party had a *bonâ fide* belief in their truth; and in charging the jury, p. 282-3, he said: "It is necessary, first, that there should have been a statement false, and made without an honest belief of its truth. If a man makes a statement as to which he has neither knowledge nor belief, and makes it for the purpose of deceit, that is fraudulent. But if a man makes a statement he believes to be true, though it afterwards turns out not to be so, he is not liable for false representation. If it were not so, men would be daily liable for representations honestly made and believed to be true, but which turned out to be untrue. Therefore the question will be, whether the defendants put forward the representations in the prospectus with the belief of their truth." And at p. 284: "If, however, you believe the prospectus contained any statements fraudulent and false—that is, false and not believed to be true—and that the plaintiff purchased the shares upon the faith of their truth, then he will be entitled to the verdict. . . . This is a case in which the parties are charged with statements false and fraudulent, and you must consider the case, not as lawyers, but as practical men. . . . Can it be said that the statement was not merely incorrect, but false and fraudulent?"

In *Clarke v. Dickson*, 6 C. B. N. S. 464, the report shews that at *nisi prius* the presiding Judge told the jury "that if the prospectus was issued to the public with the sanction

and assent of the defendant, and contained statements which were false to his knowledge, he was liable to the plaintiff, if, acting upon the faith of it, he sustained damage therefrom. . . . that, to render the defendant liable, they must be satisfied that he was guilty of moral fraud in the transaction, that the representations complained of were false to his knowledge, and that the plaintiff sustained damage therefrom."

In *Cullen v. Thomson's Trustees*, 4 Macq. H. L. 424, S. C. 6 L. T. N. S. 870, it was held that when the directors of a joint-stock company issue false and fraudulent reports to the public, and the manager and other officers supply the detailed statements for such report, knowing them to be false, and that they are to be used for the purposes of deceit, and a third party purchases shares in the company and suffers loss thereby, such officer who knowingly assisted in the fraud is personally liable to such third party for the loss caused by such misrepresentations in the report, though only signed by the directors and not by the subordinate officers. Though the observations were made for the purpose of shewing that the officers should be made responsible for the fraud, yet the following remarks of the Lord Chancellor (Lord Westbury) shew the position which the directors and manager occupy in a bank. He said, "It is true that the business is to be carried on under the superintendence and control of the directors, but it is obvious that in a joint-stock banking company the officers on whose judgment, skill, integrity, and exertions, the success of the undertaking would mainly depend, must be the managers. The condition of the affairs of the bank must, if the conduct of it be just and honest, appear from the books kept by the managers; and the reports of the directors would, *primâ facie*, be accepted by all persons acquainted with the subject as the results of the accounts and statements of the managers. Again, the managers of a joint-stock bank are well-known public officers, whose due selection is more important than that of the directors themselves, for it may be taken as a fact of which we cannot be judicially ignorant,



that the credit of a banking establishment depends in no inconsiderable degree on the opinion entertained of the knowledge, ability, and character of the manager."

Now, here the statement on which the report was founded was prepared by Mr. Cassels, the cashier, the officer in whom the directors would naturally have confidence, and whose peculiar business it was to know the condition of the bank. He states that he prepared the statement in the usual way, not deducting a particular sum from each debt that might not be considered good, but in truth making a disposition of the surplus of the earnings of the year, after paying the dividends, which would be available to cover any losses that might arise from bad debts or overvaluation of assets. The plaintiff does not call witnesses to shew, as was done in many of the cases that are reported in the books, that the officers and directors of the bank well knew that it was in an unsound condition, and that they ought not to have declared any dividends out of their profits. But they say, because the bank was obliged to cease paying dividends, and had lost a large portion of its capital two years after the report complained of was made, that was evidence to shew that the report of 1866 was false and fraudulent. I do not think, under such circumstances, that fraud can be inferred. Mr. Cassels says the serious losses that affected the credit of the bank were developed by the failure of banks and individuals after the report of 1866 was made. And as to estimating the value of the Hamilton debentures on a wrong principle, the evidence fails to shew any fraudulent intent in so doing. It is not shewn that Mr. Cassel's evidence and the statements made by him were untruthful, nor that he did not believe the assets taken at their value, with the rest and reserved profits, were just sufficient to meet any liabilities and keep the capital intact. The plaintiff's counsel repeatedly drew from the witness the answer that the directors knew the statements he made, or had made, were correct, with a view no doubt of shewing that the defendant was in fact aware that the statements were not correct. The inference fairly to be



drawn, I think, from what the witness said is this: The directors, from the fact of many of the securities and properties taken by the bank having been taken with their assent, knew that the bank held them as assets and the value at which they were taken, and that they were referred to in the statement. That the statement itself was correct he constantly asserted. He accounted for the way in which the bank was transferred to the Bank of Commerce in consequence of the new directors forcing a sale of the securities, and realizing them, and thereby making large losses.

When fraud is charged we naturally look for some motive inducing parties to perpetrate it. It may be said that the cashier might have been induced to make a false and fraudulent statement of the affairs of the bank, in order to induce the directors to carry on its business, as if its true state had been represented it would be necessary to close its doors. But what motive could the defendant and the other directors have for concurring in such false and fraudulent statements of the affairs of the bank? They and their friends were large owners of stock, and it is not suggested that any of them ever offered a share of the stock for sale, and it is stated that none of it was sold by them after the report was made. I fail to see any evidence or motive from which we can properly infer that this defendant, or the other directors, entered into a dishonest scheme to cheat intending purchasers of stock. Their cashier may have been mistaken in the estimate he placed on the value of the assets of the bank. They may also have assumed that his valuation was correct. It would scarcely be possible for any one director to acquire that knowledge of the value of the assets that would enable him to say the estimate made by their own officer, whose peculiar business it was to know these matters, was a false estimate of their value.

If it had been hinted that inquiry was necessary (though the rest and reserve profits would seem to have left a large margin for losses) the directors themselves could not have

undertaken the investigation of the character and value of the assets. Some person or persons would have been nominated by the directors to make the investigation, and they would have then been compelled to act to a certain extent on the information and judgment of others. Can it be said they were guilty of falsehood and fraud because they relied on the statements prepared by their own proper officers, whose capacity and integrity had never been questioned up to that time?

In a proceeding of this nature, the very gist of the action is the fraud of the defendant, I think the plaintiff failed to produce the evidence of fraud necessary to sustain his case, and therefore that the nonsuit was right.

Whether the facts disclosed in this case are such that a Court of Equity would hold that the defendant ought to have known that the statement made by the officer of the bank was false, if it was false, so as to make the defendant liable to the plaintiff for the loss incurred in the purchase of the stock referred to, I am not prepared to say. In the very recent case of *Peek v. Gurney*, before the Master of the Rolls, in which judgment was given in November last, reported in 25 L. T. N. S. 446, and in L. R. 13 Eq. 79, many of the cases both at Law and in Equity are referred to. Lord Romilly gives a very elaborate judgment, and states some of the doctrines of the Courts of Equity which may carry the liability of parties much farther than is done in the Courts of Common Law. In reference to the necessity of disclosing facts within the knowledge of the party, the learned Master of the Rolls said, p. 111: "When the unexpected calamity happens, a director cannot be allowed to say, 'I knew the fact well, but I did not consider it of any moment.' The Court must judge for itself whether it was of moment, or not, and will impute that knowledge to each director which, if he did not possess, he ought to have possessed, and will visit him with the consequences naturally flowing from it. This, in my opinion, is a familiar doctrine of equity." Towards the conclusion of his judgment he refers to the argument of the defendant's counsel, as to the

statements in the bill. He said: "Mr. Roxburgh, in a very able part of his argument, pointed out many passages in which the words 'a dishonest and nefarious purpose,' or equivalent expressions, were employed in the Bill as applicable to the directors. He observed justly that the Court treated with great severity charges of fraud when they were not proved; and he referred to observations of mine in former cases, where I have repudiated any distinction between equitable fraud and moral fraud, and where I have stated that all fraud was dishonest and must be treated as such. He then referred to the trial of the indictment to shew that they had been acquitted of all criminal fraud, and he thence inferred that they were acquitted of all moral fraud, and therefore of all equitable fraud, and that as a necessary consequence the bill must be dismissed with costs. This same line of argument was adopted generally for the defence. I assent in a great measure to the argument, which at the time, and since, I thought very ably put, and which I have endeavoured to state as fairly as I can; but it appears to me to involve this assumption, which I think erroneous, viz., that all frauds are of equal moral intensity. But it is not because all frauds are dishonest, and all frauds are treated as such in a Court of Equity, that therefore there is no distinction between one species of fraud and another. Some are of much deeper dye than others; and it is not until the frauds assume such deep dye that they are cognisable by a Court of criminal jurisdiction. It is not that they are not all highly culpable in an extended moral sense, but that they are not all criminal in the sense that, under the statute passed for that purpose, they can be taken notice of in a Court of criminal procedure. . . . Here the directors were not only bound to know the state of the concern, but they did actually know it, and they suppressed the fact. They did so innocently in this sense, that they did not gain, and did not seek to gain, any advantage to themselves by such concealment; but they were nevertheless highly culpable in a moral point of view, although the act was not one cognizable in a Court of criminal procedure, but

was one which by the English law (I think properly) is not treated as a crime. But the equitable jurisdiction and the consequences remain untouched."

On the whole, looking at this action in this Court as based on the ground of fraud and falsehood used and practised by the defendant, whereby the plaintiff was injured, as already intimated, I fail to see the evidence to sustain it, and I think the rule to set aside the nonsuit must be discharged.

MORRISON, J., and WILSON, J., concurred.

*Rule discharged.*

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CONTROVERTED ELECTIONS ACT, 1871. ELECTION FOR THE COUNTY OF PRESCOTT, HOLDEN ON THE 14TH AND 21ST DAYS OF MARCH, 1871. JAMES STEWART MCKENZIE AND JOHN HAMILTON CLEVELAND, PETITIONERS; AND GEORGE WELLESLEY HAMILTON, RESPONDENT.

*Controverted Elections Act of 1871—Costs—Discretion of Master—Fees of witnesses not called.*

In trials under the Controverted Elections Act of 1871 the costs and witness fees, and the materiality of evidence, are in the discretion of the Master, subject to the Court, as in other trials.

The Master will generally be the sole judge as to how many witnesses shall be allowed for as to one issue.

So where the Master allowed fees, to seventy witnesses subpœnaed, but not called, on charges of bribery by the petitioner, the election having been avoided on the evidence of other witnesses: *Held*, that the Master exercised a proper discretion, even though respondent's attorney swore he believed the witnesses would have disproved the charges they were called to prove; the facts, that each witness was subpœnaed to prove, appearing on the petitioner's brief put in before the Master, and it appearing also by affidavit that the witnesses were subpœnaed *bona fide*, and were material.

There is no presumption in a trial under the Controverted Elections Act of 1871, arising from the number of witnesses subpœnaed, that they are unnecessarily called. The presumption is to the contrary.

In this Term *Hector Cameron* obtained a rule calling on the petitioners to shew cause why the Master should not review his taxation of the petitioners' costs,



payable by the respondent under the order of the Chief Justice of this Court, on the following grounds: 1. Because the Master has improperly allowed the fees to those witnesses who attended at the trial but were not examined as witnesses. 2. Because the Master has not allowed an adequate or proper sum for the costs of the respondent, of and incidental to those issues and matters in respect of which the petitioner failed at the trial.

*J. K. Kerr* shewed cause. The petitioners subpoenaed eighty-five witnesses. There were fifteen examined. The expenses of four or five of these fifteen have been allowed, and have not been disputed. The expenses of rest of the fifteen are not allowed, and are not of course complained of.

A few of the seventy remaining witnesses were then examined, when sufficient was proved to avoid the election. The respondent admitted that must be so. The remainder of the seventy were not examined in consequence, and the election was declared void. The Master has allowed the expenses of these seventy witnesses to the petitioners, and it is of such allowance the respondent has complained. These witnesses were all necessarily subpoenaed, and it is a question for the discretion of the Master whether their expenses shall be allowed or not.

The rule is to allow them, unless the Court can see they were quite unnecessary: *Morgan & Davy* on Costs. 1, 2; *Marshall* on Costs, 241, 267; *Hill v. Peel*, L. R. 5 C. P. 178, 180; *Tillett v. Stracey*, L. R. 5 C. P. 187; 22 L. T. 99; *Re Page*, 32 Beav. 487; *Miller v. Thompson*, 4 M. & G. 260; *Adamson v. Noel*, 2 Chitty R. 200. As to the respondent's costs of issues, he was allowed \$13.05. This was all he could possibly be entitled to. He was put to no actual expense by reason of the charges which were not proved being stated against him. In addition to that he was in fact allowed a sum of \$60 on account of a counsel fee, by the Master striking \$60 off the counsel fee of the petitioners: *Marshall* on Costs, 133: *Arch. Pr.* 11th ed. 503; *Fazakerly v. Rogerson*, 1 L. M. & P. 747.

*Hector Cameron* supported the rule. The witnesses' fees were not items as between solicitor and client. The solicitor did not pay them. They should have been taxed in the ordinary way, as between party and party. The Master should not have allowed for those witnesses who were not examined, unless they could, if they had been called, have given evidence material to the petitioners.

There were forty-nine charges of bribery. On eleven of these charges the petitioners failed. The expenses of these witnesses have not, of course, been allowed. The other thirty-eight charges were not gone into; yet the Master has allowed the expenses of every witness not examined as to these charges just as if they had all been called and had proved the charges.

WILSON, J.—The rule has always been as it is stated in *Arch. Pr.*, 11th ed., 512: "The Masters will allow the expenses of all necessary witnesses, and this although they were not called at the trial. \* \* \* So although the evidence of particular witnesses be not in strictness admissible, yet if there was reasonable ground for believing it to be admissible, the Master will allow the expenses of them, even though they were not examined at the trial. But the Master will not allow the expenses of witnesses whose testimony is clearly inadmissible, or whose testimony would not have supported any issue in the cause."

The Master is the judge of the materiality of witnesses, subject to the review of the Court; but he is generally the sole judge of the number of witnesses to be allowed in support of the same matter.

The costs in this proceeding are, by the Controverted Elections Act of 1871, sec. 44, to "be taxed according to the same principles as costs are taxed between solicitor and client in the Court of Chancery."

And that rule must apply not only to the *quantum* of charge, but to some extent to the nature of the business to be allowed for, if the business charged for could be properly done or charged for as between party and party.

The petitioners' counsel's brief was produced to the Master shewing what each witness was called for and was expected to prove. *That* in addition to the affidavits made, that the witnesses were necessary and material witnesses, and were subpœnaed in good faith to substantiate the charges, was quite sufficient to justify the taxation of their expenses for the petitioners.

The affidavit filed for the respondent now is this: "That from the enquiries so made into the charges in the said particulars, and from the statements of parties made to me who had been summoned as witnesses by the petitioners to prove the said charges of bribery, treating, and undue influence, I believe that the several witnesses named in the third schedule hereto annexed, who were summoned to prove the charges connected with their names, but were not called on said hearing, would probably all, if called on said trial, have disproved said charges so made in respect to them."

If the affidavit had been much stronger, that the witnesses "would not have proved the charges, but would positively have disproved them," I still do not see what else the Master could have done, unless by asking some one to swear to the truth of the statements made in the brief, according to the best of his knowledge, information, and belief, shewing, of course, the sources of the same.

If the different witnesses themselves were to swear that they could not have proved the matters required of them, and others were to answer that they believed the witnesses could and would have done so if they had been examined, what should the Master do?

In my opinion he must judge on these conflicting statements, and on the nature of the case. He must consider the character of the charges, the difficulty of proving them, the tendency, (to say the least of it), that many have to conceal, to give a different meaning to, or perhaps to deny altogether, the matters and facts of enquiry in such a case from different motives. They may think, perhaps, that the other side have done far more and far worse; that in



elections all things are fair, and that at most it was no sin, if all were said and done just as it was suggested was actually said and done. Then again many persons must probably, be affected, if any are affected at all, by charges of that nature. And so the summoning of many witnesses is necessitated.

Now these expenses are a profit to no one. It is neither the interest of the parties nor of their professional advisers to create them or increase them. It is not commonly so at any rate. Each party knows that these expenses may perhaps, have to be borne by himself. The reasonable, presumption is, that they would not be unnecessarily incurred. And that presumption must, I think, be maintained, subject to the discretion of the Master until it is removed by more convincing evidence to the contrary. It may be said, what protection has the respondent or any one similarly situated as he is against unwarrantable charges, if all the uncalled witnesses for the petitioners are to have their expenses taxed against him? I can only say, that such a matter is to be settled by the Master, and, if necessary, by the Court. But what more can the Court do which the Master has not done; or what is the Court to order the Master to do? I do not see what I could have done differently from the Master. I do not know what he should now be told to do. In *Duke of Beaufort v. Lord Ashburnham*, 13 C. B. N. S. 598, an aged witness had been examined under interrogatories. He afterwards attended at the Assizes, but was not examined. The Court confirmed the Master's taxation, allowing the expense of the examination of the witness on interrogatories as "a proceeding of commendable prudence," and allowed also the expense of the witness's attendance at Court, and the expenses of his son, also, who took charge of him. Witnesses called to speak to damages will be allowed, although nominal damages only were recovered: *Pilgrim v. The Southampton and Dorsetshire R. W. Co.*, 8 C. B. 25. I think the respondent has not made out a case; and I confess it strikes me as exceedingly difficult to make out a case. But if one were made out, as if it could be shewn



that one-half or any of these witnesses were absent from the country, or any other convincing reason were given why they were not and could not have been witnesses, the taxation should be re-opened. As it is, we are of opinion the rule must be discharged.

MORRISON, J., concurred.

*Rule discharged.*

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REGINA V. PRINGLE ET AL.

*Bond by surety for postmaster—Neglect by the department to proceed against the principal—Effect of—33 H. VIII., ch. 39, sec. 79.*

To a *sci. fa.* against P. on a bond to the Crown, dated 5th June, 1865, in \$2,000, conditioned that one W. should duly perform his duties as postmaster at C., and pay over to the postmaster-general all moneys, defendant pleaded that W. converted the moneys to his own use with the knowledge of the Post Master General, but without defendant's knowledge; and that the Postmaster General did not inform defendant of W.'s default, but continued him in the office for three years, during which he frequently made default, and did not compel him to pay over each three months in pursuance of the statute, and was guilty of gross negligence in the matter, by reason whereof C. was in good conscience discharged.

By Consol. Stat. U. C. ch. 31, postmasters were required to give bonds for the faithful discharge of their duties required by law or which might be required by any instruction or general rule for the government of the department; the Postmaster General might appoint the periods at which they should render accounts, and if any postmaster should neglect or refuse, at the end of every such period the Postmaster General should cause a suit to be commenced against him; and a postmaster neglecting or refusing to account and pay over for a month after the time prescribed, was subject to a specified penalty. The Dominion Act of 1867, 31 Vic. ch. 10, repeated these enactments, and the Audit Act of that year, ch. 5, like the C. S. U. C. ch. 16, required all officers employed about the Revenue to render accounts, and pay over at least once in three months.

It appeared that W., on the 30th of June, 1866, made default for two quarters exceeding \$900, which was notified to the inspector and afterwards settled. In December, 1866, he again made default for two quarters more, of which the inspector became aware in January, and there was a running balance against him until April, 1869, when it exceeded \$2,500; after that he paid up current collections and reduced the old debt, and a new bond was taken in 1870. Up to that time he had been constantly pressed for payment by the department, but not sued. The sureties were not informed of his default, and on one occasion, when he owed over \$2,000, the inspector told him he must inform the sureties, but was dissuaded by him from doing so. There was never, however, any arrangement to give time, but a constant pressure for

immediate settlement; and the surety was not shewn to have made any inquiries on the subject.

*Held*, that, apart from the statutory provisions above mentioned, there was no ground upon which the sureties, under the 33 H. VIII. ch. 39 sec. 79, could claim to be relieved, and that these provisions imposed no obligation on the Postmaster General towards the surety.

*Held*, also, that the plea was bad in law, as shewing no defence, and because the surety would at all events be liable for at least one quarter's default, which would entitle the Crown to judgment. (a).

SCIRE FACIAS on a bond, dated the 5th of June, 1865, made by the defendant G. C. Wood and the other defendant James F. Pringle, in the penal sum of \$2,000.

Wood did not appear. The other defendant, Pringle, pleaded the following plea: that the bond in the said writ mentioned was conditional, and by the terms thereof it was to be null and void if the above named defendant G. C. Wood should duly and faithfully perform his duties as postmaster at the town of Cornwall, in the county of Stormont, including the paying over to the Postmaster-General of Canada all moneys to become payable to him from the said G. C. W. as postmaster aforesaid: that the defendant Pringle executed the said bond solely as surety for the said Wood as postmaster as aforesaid: that the said defendant Wood duly and faithfully performed all his duties as postmaster as aforesaid, save that he made default in payment to the Postmaster-General of moneys of our Lady the Queen received by him as such postmaster as aforesaid, and converted the said moneys to his own use by and with the knowledge of the Postmaster-General, but without the knowledge and consent of the said defendant; and the said Postmaster-General, well knowing the premises, did not inform the said defendant Pringle of the said default of the said defendant Wood, nor did he remove him from the said office, but continued him therein for a long space of time, to wit, for the space of three years, and during the said space of three years the said Wood frequently made default in payment to the Postmaster-General of the moneys of Her Majesty held by him as such postmaster as aforesaid, and converted the same to his own use; but the

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(a) See note at page 324.

said Postmaster-General, although well knowing the said premises, did not inform the said defendant of the same until the expiration of the said period of three years. The defendant further saith that the said defendant Wood was, at the time of the making of the first default, indebted to Her Majesty only in the sum of \$900 or thereabouts, and was at the said time well able to pay that sum; and if the said defendant Pringle had, at the time of the making of the first of the said defaults, been informed of the same, he could have compelled the said defendant Wood to indemnify him against the said bond, and in default thereof could have enjoined the said defendant Wood from acting in the said office. The said defendant Pringle further saith that, during the said three years, the default of the said Wood became so large in amount, to wit, the sum of \$2,000 and upwards that the said defendant Wood was unable to pay the same. The said defendant Pringle further saith, that it was the duty of the Postmaster-General, in pursuance of the statute in that behalf, to compel the said defendant Wood, at least once in three months, to make payment of the said moneys so due to Her Majesty; and the said defendant, at the time of the entering into the said bond, relied upon the performance of the said duty by the Postmaster-General, and would not, except for the existence of the statute imposing such duty, have entered into the same, and during all the said period of three years believed that the said defendant Wood had made all such payments to Her Majesty as were by him due to Her said Majesty. And the said defendant Pringle further saith that, in all the said transactions of the Postmaster-General with the said defendant Wood, the said Postmaster-General was guilty of gross negligence in not compelling payment of the said moneys so due to Her Majesty as aforesaid every three months, as required by the said statute,—all which said several matters and things he, the said defendant Pringle, is ready to verify; and the defendant Pringle, in pursuance of the statute in that behalf, sheweth the said

matters by him alleged as a sufficient cause why he is discharged in good conscience from the said debt.

Wherefore the said defendant prays judgment, &c.

The Attorney-General, for the Crown, took issue on the plea, and demurred thereto on the grounds :

1. That the said plea is bad in law, and no answer to the claim of Her Majesty the Queen in respect of the matter pleaded to.

2. That it was not the duty of the Postmaster-General, nor was he required by law, either statute or otherwise, to make known to the defendant pleading any default of the defendant Wood or to give him notice thereof.

3. That it was not the duty of the Postmaster-General nor was he required by the statute regulating the Postal Department, to compel the defendant Wood at least once in three months to make payment of moneys due by him to the department.

4. That it was the duty of the defendant Pringle, as surety for defendant Wood, to see that the defendant Wood performed faithfully the duties for the performance of which the defendant Pringle became such surety ; and for all that appears the defendant Pringle was fully aware of all the defaults of the said defendant Wood, nor is it denied in the said plea that he had such notice.

5. That, at all events, the moment that the defendant Wood made default either in the making his returns or in paying over the moneys, the said bond became forfeited, and Her Majesty was entitled to collect the full amount of the penalty. Because the said plea confesses a breach of the condition of the said bond upon and in respect of which Her Majesty is entitled to recover the penalty in said bond mentioned, but shews no ground of defence to the action in respect of such bond.

Joinder.

The issue in fact was tried at the last Winter Assizes held in Toronto, before Wilson, J., when a verdict was rendered for the Crown, subject to the opinion of the Court upon the evidence given.



The evidence was as follows:—*Mr. Sweetnam*, Inspector of the Toronto Division of the Post Office Department, said: “I was inspector of the Kingston division, which included Cornwall, from the 13th of June, 1857, to the 30th of June, 1870. I know Wood the postmaster at Cornwall; he was in default for money received by him in his office. I look at the account put in; it shews a balance due since the 5th of June, 1865, the date of his bond. This account shews a balance due by Wood of \$2,279.60. On the 30th of September, 1870, the balance due by Wood was \$2,130.16. The Crown, on the 23rd of June, 1870, took another bond from Wood, with other sureties, for the due performance by him of the duties of his office. At that time the balance against Wood on the present bond was, I think, over \$2,000. It was my duty as inspector to examine the manner in which Wood's office duties generally were performed; had to do so at no fixed time; did so probably once a year. When postmasters are in default notice is given by the department to the inspector. We then are supposed to take action against the postmasters to obtain payment from them. I first became aware Wood was in default by letter from the department in August, 1866. The default was then \$944.72 up to the close of the quarter preceding, which would be the 30th of June, 1866. That default extended over two quarters. All the default was from the 1st of January, 1866. I did not discover the default; had no means of discovering it. Postmasters do not, as a rule, keep copies of the accounts which they transmit to the department. There are some accounts with postmasters I can check. The inspectors trust to their receiving notice of the defaults of postmasters from the department. After the quarterly return ending the 31st of March, 1866, and after the month allowed by postmasters to pay up, the department would know the postmaster was in default. Speaking from memory, the default at the end of March, 1866, was \$500 or over. On being notified in August, 1866, of Wood's default, I pro-

ceeded to Cornwall in September, I think, with copies of the accounts, and saw him. Within two months of that time he paid up as much as the arrear was in August, of \$944.72. I reprimanded Wood; did not see his sureties, nor notify them of the default. I knew Mr. Pringle the surety; he was then judge of the County Court, and lived in Cornwall. The next intimation I had of a default of Wood was in January, 1867; I think I saw him in February. The default would then, I think, be between \$500 and \$600; it may have been more; am not sure what it was; it may have been between \$800 and \$900. A sum of between \$500 and \$600 would be about the amount which would be from the end of June to the end of December, 1866; think Mr. Wood did not just then pay up that default. I am not prepared to say that particular sum was ever paid up. There were sums from that day till he ceased to be postmaster paid by him on his account. I did not speak to his sureties. I made a report to the department of my visits to Mr. Wood. I think there was some default in the following quarter. Wood remitted moneys from time to time. The next advice I got from the department of Wood's default was, I think, in 1869. I was aware, during the year 1868, there was a running balance which was not fully paid up. I did not communicate to the department. Very likely the accountant at Ottawa would every quarter notify Mr. Wood of his deficiency, and press him to pay up. The amount to the 31st of March, 1869, was between \$2,500 and \$2,600 against Mr. Wood, I think. I told him I had been advised of that default, and that he must pay up at once. I think he said he would make provision for as much of it as he could, and he would reduce it at once. I told him then I would inform his sureties. I recollect he said his means and standing were very much interested in an act of that kind, that it would not expedite the payment, and that he would like me not to see or to report to his sureties. I thought it did not make much difference, as his default was in excess of his bond. I hoped he would pay up. I

fixed no time for the payment. I put it to him that it was of immediate necessity he should do so. I had authority from the department to inform the sureties of the default; think I made no formal report for some time. I took the matter in hand, and pressed him very closely to pay up the balance. My impression is, the department did not know whether I had or had not informed the sureties of Wood's default. From that time until Wood ceased to be postmaster the balance fluctuated, but it was getting less. He paid an amount equal to the current collections and something more. Between March, 1869, and June, 1870, I visited Wood frequently more than once a quarter. I first told the sureties of the default in May or June, 1870, although it may have been a little earlier. In consequence of that, he was compelled to get new sureties. Mr. Pringle asked to be released from being surety any longer. I do not know what payments Wood made after June, 1870. So far as I know, the sureties had no knowledge of the default till May or June, 1870. I think Wood was in better circumstances in 1866 than he was in 1869 and 1870. It never was agreed between myself and Wood that he should have a time to pay the default, and, that if he did so in that time the sureties should not be informed of the default. Wood never suggested anything of the kind. My dealing with him was always that he must pay up at once. I am aware the accountant urged Wood at least quarterly to pay up. I did so myself also after I was informed of the default in 1869."

In this term *Bethune* obtained a rule calling on the Attorney-General to shew cause why, pursuant to leave reserved at the trial, the verdict should not be set aside and a verdict entered for the defendant Pringle, or why the verdict should not be reduced to the sum of \$1, or why all further proceedings should not be stayed as against Pringle, on the ground that, by the negligence of the postmaster-general in his dealings with Wood as postmaster, the defendant Pringle was discharged from all liability on the bond in question.



*John Paterson*, for the Crown, argued the demurrer and the rule together. The surety knew his responsibility, and should have seen that the principal performed his duty. *Wright v. Simpson*, 6 Ves. 714, 734; *Dawson v. Lawes*, 23 L. J. Ch. 434, 438; *McTaggart v. Watson*, 3 Cl. & Fin. 525, 539; *Goring v. Edmonds*, 6 Bing. 94; *Strong v. Foster*, 17 C. B. 201, are cases much more against the Crown than the present one. *The Queen v. Bonter*, 6 O.S. 551, which will be referred to by the defendant, disclosed a different state of facts altogether from the present case: *Clarke v. Henty*, 3 Y. & C. Exch. 187. The post office inspector is to act under instructions received from the Postmaster-General, C. S. C., ch. 31, sec. 9, sub-sec. 2; and by secs. 40, 41, 42, certain postmasters were to account quarterly, and Wood was not one of them.

*Bethune* and *McGregor*, contra. By the Dominion Act of 1867, chapter 10, sections 46–49, the Postmaster-General may call upon all postmasters to account quarterly, and the account produced at the trial shews the defendant Wood had been required to do so, and had done so, and was all along largely in default; and by the Audit Act of the same session, ch. 5, sec. 13, all officers are to account at least once in three months. The Postmaster-General should therefore have enforced an accounting every three months and oftener, if he desired it, under the statute. Wood's default was well known to the department for years before the surety was ever called upon. The plea does negative notice or knowledge by the surety of Wood's default; if it do not, it should be amended, for it was shewn to be the fact. Pringle was not an admissible witness, otherwise he would have been called: *Chitty's Prerog.* 282, The Ontario Evidence Act, 33 Vic. ch. 13, does not apply to Revenue cases, which are within the control of the Dominion Government. It is more reasonable the sureties should be apprised of the principal's default by the creditor than that they should be constantly inquiring if a default had been made. The department should on the facts have given notice of the



default to the surety. The plea is pleaded under the 33 H. VIII., ch. 39, sec. 79, which entitles the surety to relief in all cases where "law, reason, or good conscience requires it." *The Queen v. Bonter*, 6 O. S. 551, was an instance in which the Court interposed on behalf of the surety on motion. They referred also to *Mountague v. Tidcombe*, 2 Vern. 518; *Burge on Suretyship*, 218.

WILSON, J.—Such a defence as this can be pleaded under the statute of 33 H. VIII., ch. 39, sec. 79, either as a matter of law or of equity: *West on Extents*, 201, *et seq.*; *Manning's Ex. Pr.* 101. The question is to settle what is available as "good, perfect and sufficient cause and matter in law, reason, or good conscience in bar or discharge of the said debt or duty?"

It must *at least*, I presume, be as good, perfect and sufficient cause and matter as would be a defence at law or in equity to a claim by a creditor against the surety where the controversy is between subject and subject. I shall therefore consider the case at present on that ground.

In *Mountague, Executor of Ewer v. Tidcombe*, 2 Vern. 518, Ewer gave the defendant £600 to take his son apprentice, and entered into a bond of £1,000 for his fidelity, and took a covenant from defendant that he should at least once a month see the apprentice make up his cash. The Court relieved against the bond because the bond and covenant were an agreement that the surety would be liable, provided the accounts were taken monthly, and it was the Master's place to see the cash effectually made up, and because the Master had been guilty of great negligence. The plaintiff was relieved on paying one month's defalcation. In *Wright v. Simpson*, 6 Ves. 714, Lord Eldon said, at page 733: "As to the case of principal and surety, in general cases I never understood that, as between the obligee and the surety, there was an obligation of active diligence against the principal. \* \* \* The surety is a guarantee, and it is his business to see whether the principal pays, and not that of the creditor." In

*Goring v. Edmonds*, 6 Bing. 94, the defendant, in April, 1825, guaranteed the payment of money by his son to the plaintiff on a sale of timber. The plaintiff received part payment from the son, and he made repeated unsuccessful applications to him for the remainder till December, 1827, when the son became bankrupt. The plaintiff never disclosed to the defendant the result of his unsuccessful applications to the son, but in December, 1827, he sued the defendant on his guarantee. *Held*, the defendant was not discharged by the time that had elapsed, nor by want of notice of the applications which had been made to the son. Gaselee, J., at page 100, said: "I think a surety has a duty cast upon him to go and enquire as to the state of the transaction." See also *The North British Insurance Co. v. Lloyd*, 10 Ex. 523; *Hamilton v. Watson*, 12 Cl. & Fin. 109. Mere passiveness in not taking proceedings against the debtor will not, in the absence of a stipulation rendering activity on his part necessary, release the surety. The surety must himself use due diligence, and take such effectual means as will enable him to call on the creditor either to sue or to give the surety the means of suing: *Eyre v. Everett*, 2 Russ. 381. A delay of five years in the case just mentioned did not discharge the surety.

Mere passiveness when there has been no fraudulent concealment by the creditor of the default of the principal, will not discharge the surety: *Rees v. Berrington*, in 2 White & Tudor's L. C., 719 in the notes; *Way v. Hearn*, 13 C. B. N. S. 292. But passiveness may be a defence if the creditor were to sue the principal without delay after default: *Hall v. Hadley*, 2 A. & E. 758.

In *Dawson v. Lawes*, 1 Kay 280, 23 L. J. Chy. 434, a bond was given by the official assignee of a bankrupt estate to the Registrar of the Court with sureties. It was doubted whether the sureties would be discharged by the neglect of the creditors' assignees to see after the official assignee, as the statute designed by directing the bond to be given to the registrar that the sureties should not be discharged by the neglect of the creditors' assignees. But

it was said that the negligence of the creditors' assignees, if it could be a discharge, must amount to a connivance at the official assignee getting the fund into his hands improperly, or must be so gross as to amount to a wilful shutting of the eyes to the fraud he is about to commit.

In *Strong v. Foster*, 17 C. B. 201, it was held that the creditor, a banker, having a promissory note against the principal and surety, was not obliged to charge the note to the principal against the money at his credit when the note became due, and that the surety was not discharged because the creditor did not do so.

At the time this bond was given, in 1865, the Con. Stat. C. ch. 31 was in force. By section 39 of that Act postmasters are to give bonds with sureties for the faithful discharge of their duties required by law, or by any instruction or general rule for the government of the department; and payments made after the giving of a new bond shall be first applied to any balance due on the old bond, unless the postmaster expressly directs the payment to be applied towards the new bond; and no suit is to be instituted against any surety after two years from the death, resignation or removal from office of the postmaster, or from the date of the acceptance of a new bond.

By section 40, the postmaster-general may appoint the periods at which each postmaster shall render his accounts; and, if the postmaster refuse to render his accounts and to pay over the balance due by him at the end of every such period, the Postmaster-General shall cause a suit to be commenced against the person so neglecting or refusing.

By section 41, if the postmaster neglect or refuse, for a month after the time prescribed, to account and pay over, he shall forfeit double the value of the postages which have arisen at the same office in any equal portion of time previous or subsequent thereto, to be recovered against the postmaster and his sureties on the bond.

The Dominion Act of 1867, 31 Vic. ch. 10, was passed on the 21st of December, 1867.

Section 46 is similar to section 39 of the former Act.

Section 47 is similar to section 40 of the former Act.

Section 48 is similar to section 41 of the former Act.

By section 49, postmasters, when required by the Postmaster-General, shall render accounts under oath under such form as he prescribes.

By the Audit Act of the same session, ch. 5, sec. 13, all officers employed in the collection, management of, or the accounting for any part of the revenue, shall render accounts and pay over moneys collected at least once in every three months; but the Governor in council may, from time to time, appoint the time and mode of rendering accounts and paying over moneys collected. The same as C. S. C. ch. 16, sec. 13.

On these provisions of the statutes it was contended that the Postmaster-General has so dealt with Wood, the principal, that it would be against law, reason or good conscience, to call upon the surety to make good the deficiency.

It may be admitted that the principal should have accounted and paid over his collections at least once in every three months. He certainly did not do so; that is, he may have rendered his accounts, probably he did so, but he certainly did not pay over the collections.

The first default of \$944.72, for two quarters ending on the 30th of June, 1866, was notified to the inspector in August of that year. He saw Wood in September. That default was shortly afterwards settled.

The next default was in respect of the two quarters ending on the 31st of December, 1866. The inspector was notified of it in January. He saw Wood in February. The amount was between \$500 and \$600. There was probably a default in the quarter from the 1st of January, 1867, to the 31st of March. There was a running balance against Wood from that time till the 31st of March, 1869. The amount then against him was between \$2,500 and \$2,600. The inspector called on him to pay many times, and he did from that time pay up all current collections and a small part of the old debt.



From January, 1867, therefore, till the new bond was taken by the Crown in 1870, Wood was continually in default. He never paid up any particular account or collection, but he remitted money from time to time in reduction of his debt.

The department did not at any time connive at or sanction his irregularities. The Postmaster-General and his subordinates pressed and urged Wood to pay, but did not succeed very well.

His default was, of course, well known, but he was not forced to pay by suit or threat of suit at any time, so far as we know. There was nothing more than mere pressure by demand applied to him.

The sureties, it is clear, were never informed by the government or by any of the officials of the actual state of things.

The only occasion on which it can be said the government did what might be called not quite right towards the sureties was when the maximum deficiency was attained after March, 1869. Then the inspector, Mr. Sweetnam, told Wood he would have to inform the sureties respecting him. Wood requested him not to do so, as it would affect his means and standing, and it would not expedite the payment. The inspector's statement of the matter is important:—"I thought it did not make much difference, as his default was in excess of his bond. I hoped he would pay up. \* \* \* I put it to him that it was of immediate necessity he should do so. \* \* \* I took the matter in hand, and pressed him very closely to pay up the balance. \* \* \* It never was arranged between myself and Wood that he should have a time to pay the default, and, if he did so in that time the sureties should not be informed of it. Wood never suggested anything of the kind. My dealing with him was always that he should pay up at once. I am aware the accountant urged Wood at least quarterly to pay up. I did so myself after I was informed of the default in 1869."

In matters of suretyship it is said the rights of the

surety depend rather on a principle of equity than on a contract: *Craythorne v. Swinburne*, 14 Ves. 164; *Pearl v. Deacon*, 3 Jur. N. S. 879; *Watts v. Shuttleworth*, 5 H. & N. 235, 248.

There is nothing in this case which can give the surety the slightest claim, upon any of the authorities, which on the subject of suretyship, are the same both at law and in equity, to be relieved from responsibility by reason of passiveness, forbearance, or non-communication of the principal's default, or upon any other ground whatever than upon the failure of the government to compel the principal to pay up his defaults from time to time as they arose, according to the provisions of the statute.

The question is, what claim does that failure by the Postmaster-General give to the surety for relief?

It is certain that the liability of the surety is created by contract. His rights, however, rest as much upon equity as upon contract. They arise out of the equitable relation of the parties.

A creditor neglecting to perfect a security which he got from the principal, discharges the surety to the extent of the security so lost: *Cassell v. Butler*, 2 S. & St. 457.

So a creditor having security from the principal, and who applies it on account of another debt in which the surety is not interested, discharges the surety *pro tanto*: *Pearl v. Deacon*, 3 Jur. N. S. 879.

So payments made by the person for whom the principal was doing work in advance of the times when they should have been made, discharge the surety: *The General Steam Navigation Co. v. Rolt*, 6 C. B. N. S. 550; *Calvert v. The London Dock Co.*, 2 Keen 638.

And it is of no consequence whether the surety knew of the creditor having, or being entitled to have, such securities or not: *Pearl v. Deacon*, 24 Beav. 186; S. C. 1 DeG. & J. 461.

The defendant Pringle as surety contends that the bond was taken by the Crown and given by him under the provisions of the C. S. C. ch. 31 sec. 39, similar to the Dominion Act of 1867, ch. 10, sec. 46, to secure the

faithful discharge of Wood's duties of postmaster as "required by law, or which might be required by any instruction or regulation, or general rule for the government of the post office," and under the belief that, if Wood did not render his accounts, or did not pay over his collections at the end of any period fixed by the Postmaster-General, the Postmaster-General would cause a suit to be commenced against Wood for his default under section 47 of the Act of 1867; or that the Postmaster-General would, at any rate, compel such accounting and paying over "at least once in every three months," under the Audit Act of 1867, sec. 13, or under the C. S. C. ch. 16, sec. 13, while it was in force. And that it was in substance a part of the contract by the Postmaster-General that he should see these acts were regularly and promptly done by the principal for the surety's sake and protection, and, if he did not, that the surety should not be resorted to.

I do not see that the Postmaster-General entered into any such engagement with the surety.

The bond is worded in the usual way—that the principal should quarterly in each year, not later than twenty-five days after each quarter, make and return a just and true account, &c.; and that he should, within twenty-five days after the end of each quarter, cause all moneys received by him by virtue of his office to be paid over to the Postmaster-General. And he did not perform these duties.

The case which was relied on in 2 Vern. 518, *Mountague v. Tidcombe*, is not at all similar to the present one, for in that case the surety took from the Master of the surety's son, to whom he was responsible, a covenant that he, the Master, should at least once a month see the apprentice make up his cash; and under that engagement the Court held it was the Master's duty to see that the cash was made up monthly, and, because he had not done so, that he could not call upon the surety when he had neglected his own precedent duty. Still the surety was held to be liable for one month's default.

Nor is the case of *Hall v. Hadley*, 2 A. & E. 758, before mentioned, like to it. In that case the creditor agreed, as

part of the guarantee, that he should not resort to the surety "till he had failed after the utmost efforts, and by legal proceedings," to recover the amount from the principal; for these proceedings were necessarily required to be taken promptly, and before the surety could be called upon at all.

Nor can *Watts v. Shuttleworth*, 5 H. & N. 235, be available to the defendant Pringle, for in that case the person to whom the guarantee was given had engaged by the contract to effect an insurance for a certain sum, and if he had done so it would have been a security for the surety as well; but because he had not done so he had acquitted the surety to that extent.

All these are cases in which the person having the guarantee was to do something. Neither the bond nor the statutes require the Postmaster-General to do any such precedent act; they all make it the duty of the postmaster to exculpate himself by his own acts.

I do not see anything in this case, on the facts and merits, which does constitute a good, perfect, and sufficient cause and matter in law, reason, or good conscience, in bar or discharge of the debt or duty of the surety in this action.

If we were to hold the surety discharged on the facts stated, we should be imposing a greater burden on the Crown than there is on the subject in the like cases. The surety has duties towards the principal as well as the Crown has, and towards the Crown also, and the Crown trusted partly to the supervision he would exercise over his principal, and to his vigilance in communicating anything which he either discovered or suspected to be wrong, for his own sake, on the nomination of Wood to his office and while he was kept there.

The surety is not shewn to have ever made a single inquiry, either of the principal or of the department, to know, or to endeavour to know, how the principal was conducting himself. The Crown was reasonably diligent, not so much so undoubtedly as it might have been; but there has not been that degree of carelessness to constitute anything like connivance or fraud.



The plea fails, therefore, on the merits.

I am of opinion the plea is also bad in law—bad in substance; it is insufficient also because, on the facts set out, the surety would be liable for at least one quarter's default; and if there be any breach whatever the Crown is entitled to a judgment for the entire debt.

The rule will therefore be discharged, and judgment on demurrer will be for the Crown.

MORRISON, J., concurred.

*Rule discharged.*

*Judgment for the Crown. (a)*

### THE QUEEN V. OSLER.

*Municipal act of 1866, sec. 296, sub-secs. 20, 21—Powers of Municipality under—Liability for nuisance—Questioning by-law not quashed—Form of conviction for offence against by-law.*

A municipality, under sec. 296, sub-secs. 20, 21 of the 29-30 Vic. ch. 51, may pass by-laws relating to nuisances not of a public character.

By-law No. 502 of the City of Toronto relative to the public health of the City, secs. 10, 12, 27, 28, 29 and 30. *Held*, valid.

An agent merely to let or receive rents is not liable for a nuisance upon the premises let by him. *Quære*, as to the liability of a general agent clothed with power to let, repair, and in all respects to act for the owner.

If a nuisance existed at the time of letting, both tenant and owner are liable.

If it arises after the tenancy is created, the tenant only is responsible. On an application to quash a conviction for something done contrary to a by-law, the legality of the by-law may be questioned though it has not been quashed. Sec. 205 applies only to actions brought for acts done under an illegal by-law.

Such a conviction must shew by what municipality the by-law was passed. *Quære* whether it is essential to state the title or date of the by-law.

All persons in a municipality, whether permanent residents or not, are bound to take notice of its by-laws.

IN Michaelmas Term last *Osler* obtained a rule calling on the Police Magistrate and the City Commissioner for cer-

(a) Mr. Justice Wilson has requested the Reporter to have it noted that the cases of *Phillips v. Foxall*, L. R. 7 Q. B. 666, and *Burgess v. Eve*, L. R. 13 Eq. 450, throw a new light on transactions of the kind referred to in the above cause, and that the decision might have been different if these cases had been before the Court at the time of the argument.

tain municipal purposes, to shew cause why the conviction or order dated the 22nd of November, 1871, made by the Police Magistrate on the information of the City Commissioner, whereby the defendant was convicted "for that on the 13th of November, 1871, he, the defendant, had a drain from the privy vault which was obstructed and offensive, and did neglect and refuse to remove, clean, alter, amend, or repair the same within a reasonable time, after receiving a written notice so to do, contrary to the by-law in that behalf," should not be set aside and quashed, with costs, on the ground that the conviction was not warranted by the by-law, and that the defendant was not guilty of any offence under the by-law, and that the evidence taken upon the information shewed that the defendant was not guilty of any offence against the said by-law; and on the ground that the conviction did not shew that the defendant was convicted of any offence against any by-law of the City of Toronto, or the number or date of the by-law on which the conviction was made, as required by law.

The information stated that the informant, John Carr, Esquire, City Commissioner, was informed and believed that the defendant "is the agent for certain premises occupied by G. D. Dawson, on Simcoe Street in Toronto, and has for some time past permitted a nuisance to exist on the premises aforesaid by a defective drain—the same being contrary to law." The defendant appeared in person, and said he was not the person bound to abate the nuisance, if there was a nuisance.

The evidence was as follows :

*George D. Dawson*, Wine Merchant, said, "I rented the premises, No. 126, on Simcoe Street, in the City of Toronto, mentioned in the information, from the defendant on the 20th of September, 1871, for one year, and the writing produced under seal is filled up and signed by defendant. The receipt produced for the first quarter's rent is also signed by the defendant; the rent was paid to him by me. There is a very disagreeable smell in the house, and I had it examined, and it is stated it was under the house from

the water closet, and there is no trap in the drain that I can see to prevent the air coming from the main sewer; I have notified the defendant about this nuisance and he refuses to have it abated. This nuisance is injurious to health, and after a rain the smell is intolerable. The first rain, after I went in, the smell became dreadful; and every rain since, it is worse. I am the occupier of the premises. The smell comes from under the basement floor. I lifted a board and the smell was very bad. I did not move into the house until the first of last August; the City Commissioner did not serve me with a notice to repair the nuisance."

*George May*, said, "I am inspector under the City Commissioner; I went to examine the premises complained of, and examined them, and found a very disagreeable smell from under the kitchen floor; the stench is injurious to health. I saw the drain, which is an open drain running under the kitchen floor from the water closet; I could not examine it much for the smell was so bad, and it smelt as if from a water closet.

*Cross-examined.*—*Mr. Dawson* lives in the house; I did not see anything running in the drain; the drain had a board on each side but none on the top; it was about a foot wide and no cover on it; there was a quantity of dirty stuff in the drain."

For the defence *John Carr* said: "I am City Commissioner. This complaint is laid under Health By-law No. 502; I had a notice served on defendant according to by-law; and I received letter from him produced. The defendant admitted he received notice; he said the house was let to Dawson without any agreement."

The case was adjourned till the 22nd of November. The defendant did not appear at the time adjourned to, and was fined \$10 and costs.

The conviction was drawn up on the 22nd of November. It stated that the defendant was convicted before, &c., for that he, on the 13th of November, at and in the City of Toronto, had a drain from the privy vault on the pre-

mises number 126, on Simcoe Street, in Toronto, for which said premises he was agent, obstructed and offensive, and did neglect and refuse to remove, clean, alter, amend, or repair the same within a reasonable time after receiving a written notice so to do, contrary to the by-law in that behalf—John Carr, City Commissioner, being the complainant. And the Police Magistrate adjudged the said F. Osler for his said offence to forfeit and pay the sum of ten dollars to be paid and applied according to law, and also to pay the said John Carr the sum of \$3.85 for his costs in that behalf, and if the said several sums were not paid forthwith he ordered that the same be levied by distress and sale of the goods and chattels of the said F. Osler.

These proceedings having been brought up on certiorari.

During this Term *Robinson, Q. C.*, shewed cause. The City by-law was passed under the Municipal Act of 1866 sec. 296, sub-secs. 20, 21, which gives the City power to pass by-laws "For preventing and abating public nuisances" and "For preventing or regulating the construction of privy vaults." Section 27 of the by-law No. 502, "A by-law relative to the Public Health of the City of Toronto," provides "that the owner, agent, occupant, or other person having the care of any tenement used as a dwelling house, or of any other building with which there is a privy connected and used, shall furnish the same with a sufficient drain under ground, whenever practicable, to carry off the waste water, and the vault of any such privy shall be sunk under ground, and built in the manner hereinafter prescribed." It will be contended that as the defendant was only an agent of the premises, and as he had leased them to a person who was an actual occupant thereof, during all the time in question, that the tenant is, and at any rate the defendant is not, liable to be called on to see after the drains. It will also be contended that the subject complained of is not upon the evidence a *public* nuisance, and it is only public nuisances which the Statute and by-law provide for.

It does not follow, however, because the cause of nuisance



is within a house that it is not a public nuisance. If the subject of complaint be within the terms of the by-law, the validity of the by-law cannot be questioned, because it was not moved against in time, and by the 205th section the by-law cannot be impeached in any action so long as it has not been quashed, even although it be illegal.

Then it is contended the conviction is not sufficient in form because it does not properly refer to the by-law said to have been infringed.

The 362nd section enacts, "It shall not be necessary in any conviction made under any by-law of any Municipal Corporation, to set out the information, appearance or non-appearance of the defendant, or the evidence or by-law under which the conviction is made, but all such convictions may be in the form given in the following schedule."

The form given is not directed to be followed, it *may* be followed. The objection is that the form in the schedule states the offence to have been done "contrary to a certain by-law of the Municipality of the — of — in the said County of —; passed on the — day of — A.D. — and intituled: (reciting the title of the by-law)," while the conviction alleges this offence to have been committed "contrary to the by-law in that behalf." The reference made to it answers all purposes.

*Harrison, Q. C., contra.* The charge against defendant, as an agent, is, under the circumstances, clearly insufficient. The premises were occupied by a tenant; he was the proper person to resort to. If the property had been vacant, the owner, perhaps his agent too, might have been liable.

There was no evidence of a *public* nuisance. No one was shewn to have been affected by the matter complained of but the tenant himself, and he was never called on to remove it, and did not remove it. The by-law itself is void because it cannot extend to a domestic nuisance such as this was. It was not necessary to quash it before making this application. Section 205 applies only to actions brought against parties in respect of acts done under the by-law.

This is an application for relief to the defendant, not by way of redress for a wrong done by any one under it.

Nor can the by-law because it has not been quashed within a year, according to the 198th sec., be maintained, because it is absolutely void if the Council had not the power to pass it, and they had no such power because that power is restricted to *public* nuisances only.

Sections 12 and 13 of the City by-law are those to be chiefly referred to. The former of these sections enumerates different acts of nuisance, and then provides that "if any proprietor or his lawful agent or representative having charge of or control of such premises, or the occupants or any other persons having any legal or equitable interest therein, after having had twenty-four hours notice from the said committee or any of its officers to remove or abate such matter or thing as aforesaid, shall neglect or refuse," &c. And the latter provides "that the notice mentioned in sec. 12, if the premises are occupied, shall be served on the occupant or some servant or member of his family, and if the premises are vacant shall be served on the owner of the premises, his agent or representative," &c. This shews the occupant here was the person to proceed against.

The reference in the conviction to the by-law is quite insufficient according to the Statute. No one can tell which by-law is referred to. The date and title, or some convenient reference should have been made to it at least: *The Queen v. Ross*, H. T. 3 Vic. Rob. & Har. Dig. "Conviction," 4; *Regina v. Craig*, 21 U. C. R. 552.

WILSON, J.—The first question is properly whether the City had power to pass the by-law.

By the Municipal Act of 1866, sec. 248, the Council of the City are constituted Health Officers of the Municipality under Consol. Stat. U. C. ch. 59, and under any acts passed since then. Under that Act the Health Officers may enter and examine premises, and if they find them in so filthy or unclean a state, or that any matter or thing is

therein which in their opinion may endanger the public health, they may order the proprietor or tenant to cleanse the same and to remove what is found therein.

Under the Act of 1866 the Council may also pass by-laws for providing for the health of the Municipality, and against the spreading of contagious or infectious diseases, for preventing and abating public nuisances, and for preventing or regulating the construction of privy vaults, and for preventing or regulating the erection or continuance of slaughter houses, &c., which may prove to be nuisances. Under these powers the 10th section of the by-law is sustainable, which authorizes the committee to examine into all nuisances, &c., in the City that may in their opinion be injurious to the health of the inhabitants.

The 27th section also, which provides that the owner, agent, occupant or other person having the care of any tenement with which there is a privy connected and used shall furnish the same with a sufficient drain under ground, whenever practicable, to carry off the waste water.

And the 28th Section, that all vaults and privies shall be made tight, so that the contents thereof cannot escape therefrom.

And the 29th Section, that if the committee is satisfied that any tenement with a privy which is used is not provided with a suitable privy vault and drains, they may give notice in writing to the owner, agent, occupant, or other person having the care thereof, requiring him to cause a proper and sufficient privy vault and drain to be constructed, and in case of neglect or refusal the work may be done for the party, and he shall be liable for the expense and penalty, together not to exceed \$50.

And the 30th section, that whenever any privy vault, or drain becomes offensive or obstructed, the same shall be cleansed and made free, and the owner, agent, occupant, or other person having charge of the land in which the same is situated, shall remove, cleanse, alter, amend, or repair the same in a reasonable time after notice given to that effect; and in case of neglect or refusal, &c.



The 12th section is to the same effect.

The by-law is not limited to *public* nuisances. The Health Act gives the power to provide for cases which in the opinion of the Council "may endanger the public health."

The Municipal Act of 1866 sec. 296, sub-sec. 28, relates also to "the health of the Municipality, and against the spreading of contagious or infectious diseases." Sub-sec. 20 relates to *public* nuisances. Sub-sec. 23, as to slaughter houses, &c., does not necessarily relate to public nuisances, Sub-sec. 21, for preventing or regulating the construction of privy vaults, need not necessarily be a nuisance ; it seems to be partly a police regulation. I have no doubt the by-law is in substance a good by-law.

The question then is, is the defendant liable to be proceeded against as he was for the alleged violation of it. The defendant was and is the agent of the owner of the premises. He let it to the occupier as tenant for a year in September last. There is no evidence of the state of the drain or privy vault when the tenant took possession, but as complaint was made very shortly after he took possession, and as he says he has suffered from it every rain since then, and as he says there is no trap to the drain, and as the drain is an open one immediately under the kitchen floor, there is reason sufficient to believe the matter complained of existed at the time of the creation of the tenancy.

If that be so, is the occupier or tenant alone responsible ? I think he would be liable ; but I am of opinion from the cases the owner is liable also, because he let the place with the annoyance or offensive drain upon it, and the drain could not be used without its being an annoyance : *The King v. Pedley*, 1 A. & E. 822 ; *Gandy v. Jubber*, 10 Jur. N. S. 652 ; *Ruth v. Basterfield*, 4 C. B. 783 ; *Todd v. Flight*, 9 C. B. N. S. 337.

If the drain had been right when let to the tenant, the owner could not, merely because he was the owner, be liable : *Chauntler v. Robinson*, 4 Ex. 163.

I am not prepared to say the agent of the owner can be liable in such a case as the present.



If it had been shewn the defendant had the power of a general agent to let, repair, and in all respects to act for the owner just as the owner himself might have done, he might in such a case have been likened to one occupying the position of a superintendent or manager of works, which if made a nuisance will subject the superintendent or manager to liability as well as the proprietor: *Rex v. Medley*, 6 C. & P. 292. See also *The Queen v. Stephens*, L. R. 1 Q. B. 702.

It would be unreasonable to subject the mere agent to let and to receive rents with liability of any kind for the condition of the premises. He would have no right to control or to remove the nuisance, and that is the position which the defendant is shewn to occupy under the present conviction.

On that ground I think the case has failed against him.

If the by-law had been illegal, beyond the jurisdiction of the Council to pass, its validity might have been questioned in a proceeding of this kind, for the Council has plainly power to make by-laws only "within their proper competence," although no action can be maintained against the corporation or any one acting under a by-law until the by-law has been first quashed; but this is not an action under the 205th sec. of the Act.

There was another objection taken to the form of the conviction that it did not properly refer to the by-law alleged to have been broken, by its date or title. It does not even shew that the by-law was passed by the City of Toronto. This last objection must certainly be fatal.

I am not satisfied the mere omission of the date or title would be sufficient to vacate the conviction. In *Chitty* on Pleading, 6th ed. vol. ii., p. 264, the by-law is declared on without giving its date or title. In the *Company of Felt Makers v. Davis*, 1B. & P. 98, the by-law is not referred to by date or otherwise. The declaration there was held objectionable on special demurrer because it did not appear what the by-law was, or that there was power to pass it, the penalty being claimed simply as recoverable "under a certain by-law" of the company.

All persons within the city, either as residents or here temporarily, are bound to take notice of the by-laws of the city : *Pierce v. Bartrum*, Cowp. 269.

The other objections I need not refer to. The rule will be absolute.

MORRISON, J., concurred.

*Rule absolute.*

### CASSELMAN V. HERSEY.

*Will—Construction—Power or fee—Reservation of timber in the patent—Effect of.*

A. C., by his will, dated in 1803, directed that his debts should be paid by his executors out of his real and personal estate, and that as soon as necessary or convenient such of his executors as should prove should sell his real estate and invest one-half of the proceeds or amount of sale thereof, and apply the product interest for the support of his wife during her life. This one-half of the amount of sale he devised to her for life for that purpose, and after her death, he bequeathed it equally among his four children. The "remaining half of the proceeds or amount" of his real and personal estates he devised to the said children, share and share alike. The widow and two sons were named as executors, but the widow alone proved in 1810. The land in question was never sold by her under the power in the will, and in 1817 she died, leaving all her real and personal estate, by will, to the two surviving children, J. C. and E. C.

*Held* : 1. That the widow took a power to sell only, not a fee in the land.  
2. That the legal estate passed by the devise to the legatees and devisees of the testator, and did not descend upon the heir.

Where in a will there is a charge of debts upon the real and personal estate, and an express power is given to the executors to sell, and the proceeds of the sale are devised in certain proportions, the effect is the same as if the testator had devised the lands unequivocally to the devisees of such proportions.

The patent to A. C. contained the clause then usual, saving and reserving to the Crown all white pine trees.

*Held*, that notwithstanding this reservation the plaintiff, claiming under the patentee, could maintain trover against defendant for the white pine, for the soil in which they grew was his, and he was entitled to their shade as against a stranger.

*Held*, also, that the evidence of possession, set out below, being such as an owner could be expected to have of wild land, would alone have been sufficient to entitle the plaintiff to maintain the action.

TROVER for saw logs.

Pleas, 1st, not guilty ; 2nd, that the logs were not the goods of the plaintiff.

Issue.

The cause was tried at Cornwall, at the last Fall Assizes, before Richards, C. J., and a jury.

It appeared that the land on which the logs were cut, lots 20 and 21, in the 5th concession of Cambridge, were, with other lands, granted by the Crown on the 8th June, 1796, to one Abraham Cuyler. The patent contained the then usual clause as to mines and white pine timber. That which related to the timber was as follows: "And saving and reserving to us, our heirs and successors, all white pine trees, if any such shall or may, now or hereafter, grow or be growing in and upon any part of the said parcel or tract of land hereby given and granted."

Abraham Cuyler died in 1807. He had made a will dated the 23rd of February, 1803. So far as it is necessary for this case it was as follows: "I will, order, and direct that such debts as I may justly owe at my decease, together with my funeral charges, shall be paid and satisfied by my executors hereinafter named out of my real and personal estates; and I further will, order, and direct, that as soon as may be necessary and convenient after my decease, that my executors, such as may administer on my estate, shall sell and dispose of all my real estate that I may be vested with at the time of my decease, to the best advantage and benefit of my heirs, and that the moiety or one-half of the proceeds or amount of sale thereof shall, by my said executors, be vested in the most productive and safe funds, either in England or America, and that the product interest thereof be regularly applied and paid to and for the support and maintenance of my wife, Jane, during her natural life, which said one-half of the amount of sale of all my real estate I hereby devise and bequeath for the before mentioned purpose to my said wife Jane, during her natural life; and I further hereby give, devise, and bequeath, unto my wife, all the household furniture I may be possessed of at the time of my decease, for her sole use and behoof, and disposable at her own will and pleasure.



“Item. The remaining half of the proceeds or amount of my real and personal estates, I hereby give, devise, and bequeath unto my beloved children, Cornelius Cuyler, Jacob Glen Cuyler, Cathalya Cuyler, and Elizabeth Cuyler, each an equal one-fourth part or share of the said half of all my real and personal estates, to be divided share and share alike, to have and to hold their respective shares to them and their respective heirs, executors, administrators, and assigns, for ever.

“And after the decease of my said wife, Jane, it is my will that the said half of the proceeds of my estate that is hereby ordered to be invested and appropriated for her maintenance, shall also be divided into four equal shares to my four said children, Cornelius, Jacob, Cathalya, and Elizabeth Cuyler, each share and share alike, which I hereby further give and bequeath unto them, and each of them respectively, their heirs and assigns, for ever; as it is my full intention that my said four children shall all share alike of all my real and personal property I may have in possession or in expectation at the time of my decease.”

The testator appointed his wife, Jane, and his sons, Cornelius and Jacob, executors of his will.

The will was proved on the 22nd of June, 1810, at Montreal, by the widow, Jane Cuyler, and probate was granted to her alone.

It appeared Cornelius Cuyler died before his father, Abraham.

When Cathalya died, did not appear. Her mother made her will on the 28th of May, 1817, devising her property, real and personal, between her surviving children, Jacob Glen Cuyler and Elizabeth Cuyler, and in it she did not mention her; and on the 30th of October, 1849, when Jacob Glen Cuyler and Elizabeth Holt, formerly Elizabeth Cuyler, conveyed the land which had been granted to their father Abraham Cuyler to the Honourable Samuel Gale, they conveyed as the sole surviving children of their parents (and from whom as the deed recited they had



derived it jointly and in common, and as proprietors in common). On the 1st of September, 1851, the Honourable Samuel Gale sold the land to John Richard Casselman, and he, on the 6th of the same month, sold to Martin Casselman the plaintiff.

The evidence as to possession was as follows:—The plaintiff said: "I have paid taxes on the land since 1851. Considerable timber made over the tract by quite a number of people, who settled with me. I have been watching the timber all the year round, by sending men to look over it. \* \* In March last Mr. Graham and Mr. Bancks came to me, and reported they had cut so much timber on my land. Mr. Graham said he had cut 300 logs or more, and he wanted to know what could be done about it."

*John Graham* said, that when talking with defendant of the logs having been cut on plaintiff's land, he said, "we will go on and mark them, go on and draw them first, it will only be a trespass any way." Defendant himself, said, when Graham said he thought he had cut across the line on to Casselman's land, that he, Graham, "must go and settle with Casselman."

A verdict was found for the plaintiff with \$200 damages, leave being reserved to the defendant to move to enter a verdict in his favor, or a nonsuit, or to reduce the verdict.

In Michaelmas Term last, *R. M. Wells* obtained a rule calling on the plaintiffs to shew cause why the verdict for the plaintiff should not be set aside, and a nonsuit entered, on the following grounds:

1. Because the timber in respect of which the action was brought, was expressly reserved to the Crown in the Crown deed, and the plaintiff had no actual possession, or no such possession as would enable him to maintain an action of trover.

2. Because the plaintiff shewed no property in the said timber.

3. Because the power of sale contained in the will of the patentee was never exercised, and the fee remained in

his heir-at-law, and no conveyance from him to the plaintiff was proved.

And the rule also called on the plaintiff to shew cause why the verdict should not be reduced to \$50.

In this Term, *Bethune* and *Kerr* shewed cause. The only question of title is that arising under the will of the patentee. If the widow and executrix of testator took a fee in her husband's land, the plaintiff is entitled to recover under her will the share which Elizabeth, one of her children, took, and from whom the plaintiff claims title.

If the children of testator took the land, then the plaintiff is entitled to a third, as representing the title of Elizabeth.

The question is, did the widow and executrix take an estate or a power only?

This land was charged with the payment of debts, and *Mather v. Norton*, 16 Jur. 309, shews that in such case the executor will be deemed to have taken an estate and not only a power.

If she took a power only, then the fee remained in the heir-at-law, or in the three children, the devisees in fee. *Moore v. Power*, 8 C. P. 109, shews that a devise of the proceeds of the land, as in some parts of this will, is sufficient to carry the fee.

The plaintiff, beside his title, had possession of the land; such possession as a person can have of a wild lot.

The defendant says the plaintiff cannot recover, because these logs being made from white pine trees, were and are reserved by the Crown grant. There may be a grant of these trees, to the owner of the land, presumed: *Brown* on Statute of Limitations, 95, 96; *Darby* and *Bosanquet* on Limitations, 408 to 410. The following authorities were also cited: *Davis v. Henderson*, 29 U. C. 344; *Heyland v. Scott*, 19 C. P. 165; *Henderson v. McLean*, 16 U. C. R. 630; *Dundas v. Johnston*, 24 U. C. 547; *Davis v. VanNorman*, 30 U. C. 437, 445; *Wilbraham v. Snow*, 2 Wms. Saund., 87, ed. '71; *Jefferies v. Great Western Railway Co.*, 5 E. & B. 802; *Fyson v. Chambers*,

9 M. & W. 460; *Newnham v. Stevenson*, 10 C. B. 713; *Stevenson v. Newnham*, 13 C. B. 285; *Northam v. Bowden*, 11 Ex. 70; *Armory v. Delamirie*, 1 Smith's L. C. 316; *Bourne v. Fosbrooke*, 18 C. B. N. S. 515, S. C. 34 L. J. C. P. 164; *McDougall v. Smith*, 30 U. C. R. 607; *Hartman v. Fleming*, 30 U. C. R. 209.

*Robinson*, Q. C., and *Wells*, supported the rule. There was no sufficient evidence of possession to entitle the plaintiff to recover in trover. Possession is only sufficient when it is *prima facie* evidence of property, but here the plaintiff produced a paper title which disproved property, and the plaintiff therefore cannot rely upon possession. Having relied upon his paper title, he cannot, when that has failed, fall back upon possession.

The patent shews that the logs he is suing for are not and never were his, that the title to them has always been and still is vested in the Crown; and he cannot be better off by proving a paper title which shews he has no title in fact, than if he had not produced a title at all: *Mickle v. Oliver*, 11 C. P. 363.

The Crown has not, by any act of the plaintiff, been dispossessed of the trees. If he had fenced in the land and cultivated it, there would have been no dispossession of the Crown, for these are acts which the plaintiff, as claiming the land under the patentee, is entitled to do and can do consistently with the maintenance of the Crown right to the white pine trees growing upon the land.

The plaintiff has had no actual possession of these trees, and in 1 Sm. L. C. 318, 6th ed., it is said, "The doctrine that possession is sufficient title as against a wrong-doer, appears never to have been extended to cases in which there has not been actual possession of a specific thing." As to the effect of actual possession, see *Armory v. Delamirie*, 1 Smith's L. C. 318; *Butler v. Hobson*, 5 Scott, 822, S. C. 5 Bing. N. C. 128; *Jefferies v. Great Western Railway Co.*, 5 E. & B. 806; *Henderson v. McLean*, 8 C. P. 42; *Pringle v. Allan*, 18 U. C. R. 582. There is a difference in the possession necessary to support a title in trover, from that which is sufficient in trespass: *Addison on Torts*, 291.



The will of the patentee gave to the executrix a power to sell, and not an estate in the land : *Hopkins v. Brown*, 10 U. C. R. 125 ; *Hill* on Trustees, 471 ; *Doe d. Jones v. Hughes*, 6 Ex. 223 ; *Chance* on Powers, sec. 3047 ; *Forbes v. Peacock*, 11 M. & W. 630. And these references also shew that until the power is executed, the estate descends upon the heir-at-law. This power never was executed. The children have a bequest of the *proceeds* of the land only after sale, which shews they were not to take the land itself, but that which was to be received for it on a sale ; and the distinction between this and a devise of the rents and profits of the land, or the proceeds used in the sense of rents and profits, is very plain. If Elizabeth had an estate in the land, the plaintiff has proved a title under her ; Jacob Glen Cuyler was the heir-at-law of the patentee, and the plaintiff has not proved a title from or under him.

There can be no presumption of a grant of the white pine trees to the plaintiff, or to those from whom he claims, because there is no room for such a presumption, nor any necessity for it ; for there is nothing inconsistent in the plaintiff's possession with the title remaining in the Crown in the trees ; and a stronger case of presumption is required to operate against the Crown than against a private person.

Asto the effect of the saving or exception, of the white pine see *Com. Dig. Fait* E. 5 ; 4 *Cru. Dig.* p. 271, Tit. 32, c. 20, sec. 65 ; *Washbourne* on Real Property, 6, 2nd Ed. ; *Leith's Bl. Com.* 260 ; *Pannell v. Mill*, 3 C. B. 625 ; *Doe dem. Douglas v. Lock*, 2 A. & E. 705, 743.

WILSON, J.—It appears that the authority from Jacob Glen Cuyler to execute the deed of the 30th of October, 1849, along with his sister Elizabeth Holt, was not proved. The late Honourable Peter McGill executed it as his attorney, so that there is little doubt, in fact, that the interest of Jacob, the heir-at-law, was conveyed to the purchaser.



For the purposes of this action, no such power from him to execute the deed was shewn, and therefore no title from him was proved.

If the plaintiff recover at all, it must be in respect of the title which he has acquired under the deed of 1849, from Elizabeth Holt, one of the children of the patentee.

I think there is quite sufficient evidence of possession of the land in the plaintiff to have entitled him to recover against the defendant, a mere wrong-doer. The plaintiff has had a paper title for more than twenty years, apparently genuine, from the patentee downward. He is in possession of the muniments of title; he has paid taxes ever since he purchased the land; he has protected it from injury; he has made persons settle with him for cutting upon it; the defendant, and those cutting for him, recognised his title and proposed he should be settled with for the damage that was done to his land.

That is just the kind of possession which the actual owner can be expected to have of his wild land.

There would be no difficulty in disposing of the case on that ground, if nothing more appeared.

But it has appeared, and does appear, that the plaintiff claims the land by title from the patentee, and the whole chain of title has been put in and established.

And by that title it is shewn the Crown has reserved the white pine trees from the grant and grantee, and that there is a question of construction arising under the will of the patentee.

These are the only questions which have to be considered.

The *saving* and *reserving* in the Crown grant of the white pine trees on the land, are good words of *exception*.

The trees remained, therefore, notwithstanding the grant, the property of the Crown, and they were so at the time of the cutting and removing of them by the defendant.

The right of the Crown to the soil itself on which the trees grew was not excepted; but by reason of the excep-

tion, the Crown had the right to the nutriment of the soil sufficient for the growth and preservation of the trees which were excepted: *Liford's* case, 11 Rep. 49b, *Leigh v. Heald*. 1 B. & Ad. 622; *Smith v. Surman*, 9 B. & C. 561; *Doe dem. Douglas v. Locke*, 2 A. & E. 705. The Crown could at all times have entered by its servants, grantees, or licensees, to cut and remove the white pine trees, because they had not been granted; and in like manner the Crown could have prosecuted the patentee or those claiming under him for cutting or damaging such trees.

When the trees are not excepted in a lease, they pass as part of the demise.

In England the tenant cannot cut them. In this Province the rule I presume must be different as to wild land let for the purpose of cultivation.

In England the tenant, although he cannot cut the trees, can when there is no exception of them prevent his landlord from cutting them, for the tenant is entitled to the benefit of their shade, and to their mast or fruit: *Ivy v. Herlakenden*, 4 Rep. 62.

When the trees are excepted the lessee or grantee can have no interest in them, as against his grantor or lessor; but he must have an interest equally in their shade and mast as against a stranger, and to a remedy against him if he wrongfully deprive the occupier of them.

The reason of the case, and the authority of *Jeffries v. Williams*, 5 Ex. 792, support such a right.

It does appear to me that the lessee or grantee, when the trees are excepted, is in possession of them, as against a stranger and wrong-doer. The soil on which they grow is his. The mere right of nutriment and of standing ground are all that are left in the lessor or grantor.

The lessee or grantee is then in possession of and owner of the soil, according to the nature of his estate, on which the trees are standing. That, as against a wrong-doer, is in my opinion a sufficient possession.

That mere possession is sufficient as against a wrong-doer, is an axiom in law, as *Armorie v. Delamirie*, and the nume-

rous cases referred to in 1 Smith L. C. 316, and mentioned on the argument, fully establish. So a thief has such a property by reason of his mere possession of goods, that they may be said to be his goods in an indictment against another who steals them from him.

I cannot consider these trees as essentially different from any fixture in a house, say a looking-glass or marble chimney-piece, which on a demise the lessor excepted from it. I am of opinion, if a wrong-doer removed the fixture, the tenant who was in possession of the house, and so in possession of the fixture, although he had no property in it, could maintain an action for its removal.

The plea of no property, means no property as against the defendant: *Isaac v. Belcher*, 5 M. & W. 139; *Northam v. Bowden*, 11 Ex. 70. The case of *Harper v. Charlesworth*, 4 B. & C. 574, shews that an intruder on the Crown land may maintain trespass, by reason of his possession, against a wrong-doer who has no possession.

It is difficult to see why the patentee, or the plaintiff as claiming under him, should not be entitled to do as much as an intruder on the Crown land might do.

I think, on the ground and title of possession of the land, the plaintiff is entitled to maintain this action for the cutting and removal of the trees, if his title is sufficiently established by the paper title.

Then did the plaintiff prove a sufficient legal title to the entirety of the land, or to any part of it, undivided or otherwise? That, as has been said, depends on the will of Abraham Cuyler. The first part of the will, which was a direction to such of the executors as should administer to the estate (and that was the widow only) to sell the real estate, conferred a power only, and was not a devise to the executors. They were, on sale, to invest one-half of the proceeds of such sale in some fund, for the benefit of his wife, and to pay her the interest thereof for her life; and the testator *did thereby devise and bequeath* such one-half of the amount of sale of all his real estate, for the said purpose, to his wife, during her natural life. After the



death of his wife, her half of the proceeds was to be divided among her legatees, and he *did thereby give and bequeath* it unto them, their heirs and assigns, for ever.

The other half of the proceeds or amount of his real and personal estate, he *did thereby give, devise, and bequeath* unto his legatees an equal share of the said half of all his real and personal estates, to have and to hold to them, their heirs, executors, administrators, and assigns, for ever.

The persons who are to get the proceeds of the testator's estates are, his widow of one moiety for life, and the legatees of the other moiety absolutely, with the remainder among them of the widow's moiety after her death, and they all take respectively by the devise and bequest of the testator to them direct, through the means of and after a sale of his property certainly, but there is sufficient also to carry the devise of the land to them, and to prevent it from descending on the heir-at-law. As a general rule, when a power is conferred the estate descends on the heir: *Doe dem. Jones v. Hughes*, 6 Ex. 223; *Forbes v. Peacock*, 11 M. & W. 630. But if the estate have been devised by the will to some person, not the donee of the power, the legal title must be with him, and not with the heir: *Shaw v. Borrer*, 1 Keen 559. And it appears to me the legal estate passed by this devise, by the language used, to the children of testator who were named as his legatees and devisees.

The charge of debts upon the estate, real and personal, and the express power conferred on the executors to sell, and then the devise to the legatees or devisees that they shall take the proceeds in a certain proportion is, it seems to me, in effect, the same as if the deviser had given the land itself unequivocally, instead of the proceeds of it, to his wife and children. *Moore v. Power*, 8 C. P. 109, is a decision that the devise of the *proceeds* of the land, like *rent and profits*, is a devise of the land itself. In my opinion Elizabeth, the testator's daughter, took a one-fourth share under the will, as devisee of the land, the



executrix never having exercised her power of sale of it; and as that share was proved to have been conveyed to the plaintiff, he is entitled to recover for that one-fourth share. The damages, which were assessed at \$200, must therefore be reduced to \$50, equivalent to the one-fourth share.

MORRISON, J., concurred.

*Rule absolute accordingly.*

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BENJAMIN ROBINSON, APPELLANT V. HUGH RICHARDSON,  
RESPONDENT.

An appeal will not lie from the granting of a rule nisi in the County Court before it has been made absolute or discharged.

Remarks as to the power of the Judge to order the postponement of the trial of an Interpleader issue, where the Interpleader order directs it to be tried at a particular sittings.

THIS was an appeal upon an Interpleader issue from the County Court of the County of Perth.

The issue was whether certain cattle seized in execution by the Sheriff of the County of Perth on the 9th of February, 1871, under a writ of *fieri facias* issued from the County Court of the County of Oxford, on a judgment recovered by the said Richardson against Samuel Robinson, were at the time of the seizure the property of Benjamin Robinson as against the said Richardson, and it was ordered by the Judge of the County Court of Perth under the Consol. Stat. U. C. ch. 30, that the question should be tried at the sittings of the County Court to be holden on the 13th of June, 1871.

The issue came on for trial. The claimants' title was under a purchase which he had made some years before at a Sheriff's sale of his son Samuel Robinson's goods. He and his son gave evidence.

The entry in the case put in of what was done at that stage is as follows: "Mr. Clench (the counsel for the claimant) being unable to prove the sale from the Sheriff to

plaintiff, case adjourned till next Court on payment of costs to plaintiff. Mr. Idington, (the counsel for respondent) moved for nonsuit, and objects that no such order in this matter can be made in an interpleader. Leave reserved to move."

In the following term the respondent moved and obtained a rule calling on the claimant to shew cause why the interpleader order should not be rescinded, &c., because, 1. The claimant failed to proceed to trial, and to try the issue directed, and to prove his claim. 2. He failed to pay the costs of the day directed to be paid on the postponement of the trial. 3. The learned Judge had no power to discharge the jury, who were sworn to try the issue, and to adjourn the trial. 4. And on grounds disclosed in affidavits filed;—or why a nonsuit should not be entered on the like grounds.

The motion paper for the rule *nisi* was duly set out in the Appeal Books, and also the affidavits which were filed, and the learned Judge certified that the appeal books contained "the pleadings in the cause, and all motions, rules, and orders made in said cause, together with my judgment therein."

The reasons of appeal are, 1. That the Judge had power to grant a postponement of the trial, and to discharge the jury. 2. That the Judge should not have granted the rule *nisi*, because he had the power referred to, and the costs of the day were duly paid by the claimant.

During this Term *Ferguson*, appeared for the appellant, and *Crombie*, for the respondent.

WILSON, J.—This is a case in which an appeal has been brought because the learned Judge of the County Court has granted a rule *nisi*, and, so far as the appeal book shews, before the rule had been disposed of. As a fact, however, it was said that judgment had been given on the rule, but the appellant had inadvertently omitted to embody it in his case.

The Consol. Stat. U. C. ch. 15 sec. 67, extended to interpleader proceedings by the 27 Vic. ch. 14 sec. 4, provides that any party to a cause who may be dissatisfied with the decision of the County Court, or of the Judge of the County Court, "upon any question of law or fact arising in the course of such proceedings, may appeal from such decision to either of the Superior Courts of Common Law." And sec. 68 provides, that after the appeal bond has been duly given, "the Judge of the Court appealed from shall certify under his hand to either of the Superior Courts of Common Law named by the appellant, the pleadings in the cause, and all motions, rules, or orders made, granted, or refused therein, together with his own charge, judgment, or decision thereon," whereupon the matter shall be set down for argument at the next term of the Court appealed to, and that Court shall give such order or direction to the Court below, touching the judgment to be given in the matter, as the law requires, &c.

I do not think it was ever contemplated that parties, should appeal from every rule *nisi* or to shew cause which the Judges of the County Court may think it proper to issue. The language does not fairly apply to such a case. The Judge at that stage does not really give any "charge judgment or decision." He grants the rule merely because he thinks the particular questions agitated deserve to be considered. After he has heard the counsel he then gives his judgment or decision, and that of course is the subject of an appeal.

If an appeal will lie in this case upon the rule to shew cause, it must lie upon every rule to shew cause when any question of law or fact in the course of an interpleader arises, that is, in effect, upon every rule to shew cause in such a proceeding.

If therefore either party be called on to shew cause why particulars or better particulars should not be furnished, that may be appealed, and after it has been duly set down for argument in the Superior Court, and argued and judgment given, and the rule is permitted to stand, the rule

will then be made absolute and another appeal may be brought on that rule. So also, whenever a rule is granted to shew cause why a new trial should not be granted for surprise, on the discovery of new evidence. That rule may be appealed from, although the Judge has given no judgment or decision, and has formed no opinion whatever, and only wants to be informed what decision he shall give, and when that appeal has been disposed of, and if the rule be allowed to stand, there is still to be another appeal upon the rule absolute, or for discharging the original rule.

It is impossible such a practice can be allowed. It is not authorized by the Statute. It would be a useless, vexatious, inconclusive and expensive proceeding. We therefore disallow it.

In this case, although the learned Judge says he has certified his judgment, I presume it is an oversight. It is not likely he pronounced judgment; none has been given at any rate.

If the book be incomplete it might probable have been corrected by rule or certiorari to the Judge of the Court below to return the full proceedings according to *Williams v. Lord Bagot*, 4 D. & R. 315; *Overton v. Swettenham*, 3 Bing. N. C. 786.

We know no sufficient reason why the ease was not made perfect at first.

It is not necessary to say anything of the merits of the appeal more than this, that if the time originally fixed by the rule or order for the trial of an interpleader cannot be extended, there can be no such thing as having a new trial, or a trial at all, in case of accident preventing it, or in case the jury happen to disagree. We must dismiss the appeal with costs.

MORRISON, J., concurred.

*Appeal dismissed.*

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THE CORPORATION OF THE COUNTY OF FRONTENAC V.  
THE CORPORATION OF THE CITY OF KINGSTON.

*Action by County against City for jury expenses*—18 Vic. ch. 130, C. S. U.C. ch. 31, secs. 155-57.

Plaintiffs sued defendants under 18 Vic. ch. 130, and Consol. Stat. U. C. ch. 31, secs. 155, 157, for the proportion of jury expenses payable by defendants, from 1855 to 1869 inclusive.

In a special case stated by an arbitrator it appeared that the amount claimed for 1855 and 1856 had been paid in 1856, but the sums paid to jurors for attendance at Quarter Sessions had been omitted in making up the account for this and other years. The deficiency thus caused the plaintiffs demanded in 1868. *Held*, that it could not be recovered, for the sums claimed were not annually ascertained, determined, and demanded, as required by the Statute.

As to 1857 and 1858, accounts were made up by the County Treasurer for the use of a committee of the County Council appointed to confer with the City Council, shewing the sums due for each of these years, respectively, which sums were verbally demanded by the County Treasurer from the City Chamberlain, in the year following that for which they were payable. The sum demanded for 1858 had been levied by defendants in 1860, but not that for 1857. *Held*, that the plaintiffs might recover for both years.

As to 1859, a similar account was made up. There was no proof that it had been demanded, but defendants had levied the sum claimed for that year in 1860. *Held*, recoverable.

As to 1860 to 1864, inclusive, in 1860 a special agreement was made between the Counties and City, which the City Chamberlain asserted included defendants' portion of the jury expenses, and so nothing was demanded for these years until 1868, the County Treasurer believing that it would be useless. *Held*, not recoverable, because the sums were not annually ascertained, determined, and demanded.

As o 1866, the plaintiffs demanded and received \$877 for that year, in June, 1867, but the whole sum paid to jurors at Quarter Sessions, and County Courts was omitted in making up the accout. In April, 1868, the deficiency thus caused was demanded. *Held*, recoverable.

As to 1867 and 1868, defendants in 1868 levied the sum due for 1867, but applied it to other purposes. In 1869 they levied the sums due for 1867 and 1868, and paid it in September, 1869, but without interest which the plaintiffs demanded. *Held*, that such interest was recoverable.

As to the year 1869. *Held*, affirming the previous decision in this case, 30 U. C. R. 584, that for the purposes of ascertaining these expenses, as for all other purposes, the assessed value of the city property must be its actual value as assessed, the rule given in C. S. U. ch. 31 sec. 155 being no longer applicable.

THE declaration in this cause will be found fully set out in the report of the judgment on demurrer thereto, 30 U. C. R. 584.

The pleas were: 1. Never indebted.

2. Payment before action.

3. To the first four counts, that the said several sums claimed were not duly and annually determined, ascertained, and demanded before action brought, as therein alleged.

To the first and second counts, that the said assets were not assigned to the said plaintiffs, as in said counts alleged.

5. To the first four counts, that the defendants did not in the said several years levy and collect, for the purposes of the said plaintiffs' claims, divers sums of money, out of which they might and ought to have paid the said claims.

6. To the first, second, and third counts, that the said several sums in said counts mentioned, were not duly and annually determined and demanded by the plaintiffs, or the corporations they claim to represent, as the said sums became determinable and demandable, and the said defendants had no notice of said sums now being claimed until the year 1868; by reason whereof the defendants did not, during the said several years, raise by assessment or otherwise provide the sums requisite in each year for the payment of the said sums claimed as aforesaid, and the said defendants had not at the several times aforesaid, and had not at the beginning of this action or hitherto, any moneys belonging to them and applicable to municipal purposes generally to pay the same, or set apart for or applicable to the payment of the same, and no estimate or provision had been or was made for the payment of the same, and the defendants have no means to pay the said sums claimed without levying a retrospective rate; and the said sums are not within the ordinary expenditure of the defendants falling due within this year.

The seventh and eighth pleas were struck out. See 30 U. C. R. 590.

9. To the fifth, sixth, and seventh counts, that the alleged causes of action did not accrue within six years before this suit.

10. To the first four counts, that the defendants had not in each of the said years any moneys belonging to them applicable to municipal purposes generally, and they

did not and do not still hold any moneys or property not acquired, required or used for municipal purposes, sufficient to meet the plaintiffs said demands, or to meet any part thereof, and out of which they, the said defendants, might and ought to have satisfied the said demand or any part thereof, or which were or are applicable to the payment thereof.

The plaintiffs took issue on these pleas.

The case was entered for trial at the assizes at Kingston, held before Wilson, J., in the spring of 1871, and by consent of the parties and by the order of the learned Judge a verdict was taken for the plaintiffs for \$1000, subject to be increased, reduced, or a verdict for defendants, or a non-suit entered, by the award of a barrister, to whom it was referred to award, subject to the opinion of the Court, to whom he should state the facts by way of a special case, and should state all questions of law for the opinion of the Court which either party might desire to raise. Costs of the cause to abide the event, costs of the reference, arbitration, and award, to be in the discretion of the arbitrator.

The following are the material portions of the award:—

I find that the cause referred to me is an action brought by the plaintiffs under the Statutes 18 Vic. ch. 130 and Consol. Stat. U. C. ch. 31, to recover from the defendants a portion of the expenses incurred by the plaintiffs in each of the years 1855 to 1869, inclusive, for the payment of jnrors. And as to the said several claims I award and find as follows:

Under the first count of the declaration the plaintiffs seek to recover for the years 1855 to 1859, inclusive. And as to the claims for each of the said years respectively, I award and find as to the years 1855 and 1856: On the 30th December, 1856, the plaintiffs received from the defendants £18 16s 9d as and being the amount claimed by the plaintiffs for the defendants' share of said expenses for the year 1855; and on the same day the sum of £46 19s. 5d., as and being the amount claimed by the plaintiffs for defendants' share of said expenses for the year



1856, as appears by the account rendered and herewith submitted, marked A.

In making up the portion payable by the defendants for these two years the sums paid to jurors for attendance at the Court of Quarter Sessions were not included in the total sum expended by the plaintiffs for the payment of jurors, the County Treasurer having intentionally omitted such sums, on the ground that the expenses of the jurors at the Recorder's Court being paid by the city, it was equitable for the County to pay the jurors at Quarter Sessions. Had these sums been included in such total sum, then the portion payable by the defendants for the year 1855 would have been \$222, and, for the year 1856, \$839; and the plaintiffs now seek to recover the difference, with interest thereon, between such sums and the sums received as above stated. No demand for such difference was ever made upon defendants until 1868, and the defendants have never included such difference in their annual estimates, or collected it.

As to the years 1857, 1858, and 1859, nothing has been paid. Accounts shewing the portion of jury expenses to be paid by the defendants in these years were made up by the County Treasurer for the use of a committee of the County Council appointed to arrange with a committee of the City Council the sum to be paid by the city for the use of the gaol, and other matters connected with the administration of justice.

In these accounts (submitted with the award) as in making out the claims for 1855 and 1856, the sums paid to jurors at the Quarter Sessions were omitted. The portion thus arrived at payable by the city was, for 1857, £65; for 1858, £65 11s. 6½d.; and, for 1859, £60 15s. 8d. The amounts due for 1857 and 1858 were verbally demanded by the County Treasurer from the City Chamberlain in the year following that for which they were payable. It was not proved that any sum was demanded for 1859 before the demand in 1868 hereinafter mentioned, but in 1860 the defendants included in their estimates for that year,



and levied the sum of \$505.44 for "jury expenses for 1858 and 1859," being the amount of the two sums above mentioned as payable for said years. Nothing was estimated for or levied by defendants for jury expenses for 1857. [The award then stated what would have been the sums payable for these years had the payments to jurors at Quarter Sessions been taken into account, but that no demand for such sums was made upon defendants until 1868.]

Under the second count of the declaration, the plaintiffs sought to recover for the years 1860 to 1864 inclusive; and, as to the claims for these years, the arbitrator found that nothing had ever been demanded by the plaintiffs, except in 1868: that, on the 5th of March, 1860, an agreement (submitted with the award) was entered into between the corporation of the united counties of Frontenac, Lennox, and Addington, and the defendants: that it was asserted by the city chamberlain that the annual payment to be made under said agreement included the defendants' portion of the expenses incurred for the payment of jurors, and the county treasurer for this reason, during the continuance of said agreement, made no further demands for the payment of such portion, believing that it would be useless to do so (a).

As to the claims for the years from 1855 to 1864 inclusive, sued for in the first and second counts, the arbitrator found certain facts on which the plaintiffs in part relied as establishing their right to recover for that portion of the claims sued for arising before their separation from the counties of Lennox and Addington. It is considered unnecessary to set out these facts, as they were not pressed on the argument, and were held clearly insufficient to shew any assignment of such claims as alleged.

Under the third count the plaintiffs sought to recover for the years 1865 and 1866. The claim for 1865 was

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(a) This agreement related to the sum payable by the city to the county for the care and maintenance of the prisoners confined in the county gaol, and for the use of the court house, for which the city agreed to pay \$2,400 a year.

abandoned before the arbitrator. As to the year 1866, he found that the defendants, on the 13th of June, 1867, paid to the plaintiffs \$877.42, being the amount claimed by the plaintiffs as the portion due by the defendants for the year 1866. In the account (submitted with the award) made out by the plaintiffs for such claim, on which such payment was made, the whole sum paid at Quarter Sessions and County Courts to grand and petit jurors, \$925.70, was deducted from the total sum expended by the plaintiffs. In April, 1868, a balance of \$332.55 for the year 1866 was demanded by the county treasurer, and an account (submitted) was rendered to defendants therefor, in which the amount paid to grand jurors at Quarter Sessions was deducted, but only one-sixth of the sum paid to petit jurors at Quarter Sessions and County Courts. The plaintiffs sought to recover this balance of \$332.55 with interest.

Under the fourth count, the plaintiffs sought to recover for the years 1867, 1868, and 1869 inclusive, and with regard to these claims the arbitrator found as follows:—“As to the years 1867 and 1868, the only claim made by the plaintiffs is for interest. The county treasurer, in April, 1868, made out an account of the portion payable by the city for 1867, being \$1,917.11, and rendered it to the city chamberlain; and in April, 1869, he made out and rendered a similar account of the portion payable for 1868, being \$2,290.83 (which two accounts were submitted). The sum thus demanded for 1867 was estimated for and collected by the defendants in 1868, but applied by them to other purposes; and in 1869 the defendants estimated for and collected the sum required for both years, amounting to \$4,207.94. This last mentioned sum was paid to the county treasurer, on the 20th of September, 1869, by note at three months, with \$81.25 for interest included. He claimed interest, but it was not paid, and he gave a receipt, a copy of which is herewith submitted, marked O. In the plaintiffs' accounts for 1869 as audited appears this entry:—‘Jury Fund, September 20th.—Received from City of Kingston proportion of Jury expenses for 1867,

\$1,917.11; Do. for 1868, \$2,290.83=\$4,207.94;’ and no further demand was made for this interest before this action (a). As to the year 1869, I award and find that, about the 11th of April, 1870, the treasurer of the county of Frontenac rendered an account for that year (submitted) to the city chamberlain, claiming \$1,827.71, of which sum he demanded payment as the portion to be paid by defendants for the year 1869. In making up this account, the assessed value of the ratable property of the city of Kingston was taken to be that shewn by the assessment rolls of the said city for the year 1869. The defendants contend that such value should be ascertained according to the rule laid down in Consol. Stat. U.C., ch. 31, sec. 155, sub-sec. 3; and if in this contention they are right, then the sum due for that year would be only \$1,405.98. This last mentioned sum the defendants included in their estimate for 1870 and collected, but nothing has been paid.”

As to the whole of the plaintiffs’ claim, the award further found that the portion payable by the plaintiffs was not in or for any year ascertained or determined by any joint action or mutual agreement of the united counties of Frontenac, Lennox, and Addington, and the defendants, or of the plaintiffs and the defendants, further than is hereinbefore stated. And further, that no by-law, order, or resolution was ever made or passed by the plaintiffs or by the Corporation of Frontenac, Lennox, and Addington, directing any account to be prepared or rendered to, or any demand to be made, upon the defendants for the portion payable by the defendants in any of the said years, nor determining the mode in which such portion should be made up or ascertained, nor adopting or confirming the said accounts when made; and that the action taken by the County Treasurer, as thereinbefore

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(a) The receipt was as follows:—“Chamberlain’s Office, Kingston, 20th September, 1869. Received from the Chamberlain of the Corporation of the City of Kingston the sum of \$4,289.19, being for payment of jurors for 1857 and 1858, without prejudice to pending suit, in note at three months, with interest \$81.25 included. (Signed by the County Treasurer.)



mentioned, was taken by him wholly in the performance and exercise of, or supposed performance and exercise of, his general duty and authority as such treasurer.

And further, that except as hereinbefore stated the defendants had levied no money for the purpose of paying their portion of jury expenses for any of the years herein mentioned.

And further, that the defendants had in each of the said years real property sufficient to meet the plaintiffs' demand in this action for said years respectively; and that, including the land which by the Statute of Ontario, 32 Vic. ch. 15, the defendants were empowered to dispose of, and which last mentioned land was worth about \$6000, the defendants had at the commencement of this action real property sufficient to meet the plaintiffs' demand therein, which property, except as shewn by the facts thereafter stated (and which it is thought unnecessary to set out here) was not required or used for municipal purposes; and further, that there was no evidence before him that any of the defendants' property was purchased or procured by moneys levied for the plaintiffs. And that he was unable, from the evidence produced, to say whether the defendants had or had not in each of the years for which a claim was made by the plaintiffs in this action, any moneys belonging to them applicable to municipal purposes generally.

The written objections taken by defendants to the plaintiffs' recovery, thirty in number, were then set out, and the award concluded as follows:

"The question for the opinion of the Court is, whether upon the facts above stated, the plaintiffs are entitled, notwithstanding the said objections, to recover upon all or any of the counts in the declaration, and, if so, for how much.

"If the Court shall be of opinion upon the said facts, that the plaintiffs are entitled to recover, I award and direct that the verdict now entered for the plaintiffs shall be reduced or increased to such sum and shall be entered upon such count or counts, and for such sums upon each count, and upon such issues or issue as the Court shall direct.



"And if the Court shall be of opinion that upon the said facts the defendants are entitled to succeed upon all or any of the counts or issues in the said cause, then I award and direct that the verdict now entered for the said plaintiffs shall be set aside as regards any or all of the said counts or issues, and a verdict instead thereof entered for the defendants upon such count or counts, and upon such issue or issues, as the Court shall direct.

"And if the Court shall be of opinion upon the said facts that a non-suit should be entered, then I award and direct that the verdict now entered for the plaintiffs shall be set aside, and that a non-suit shall be entered instead thereof,

"If the Court shall be of opinion that upon the facts above stated the defendants are entitled to a verdict upon any one or more of the pleas of the defendants, but that such plea or pleas is or are not sufficient to bar the plaintiffs recovery in respect of the allegations and claims thereby confessed, then, so far as I have power or authority so to do, I award and direct that judgment be entered for the plaintiffs for such sum as the Court upon the said facts shall direct, notwithstanding the finding of the issue or issues upon such plea or pleas for the defendants.

"If the Court shall be of opinion that the plaintiffs are entitled to recover upon all or any of the counts in the declaration, then I award and direct that the costs of the reference, arbitration and award, shall be borne and paid by the defendants.

"And if the Court shall be of opinion that the plaintiffs are not so entitled, then I award and direct that the said costs shall be borne and paid by the plaintiffs."

The case was argued during this term.

*Harrison, Q. C.*, for the plaintiffs, cited *Corporation of Frontenac v. Corporation of Kingston*, 20 C. P. 49; *Corporation of Middlesex v. Corporation of London*, 22 U. C. R. 196; *Cork and Bandon R. W. Co. v. Goode*, 13 C. B. 826.

*Read, Q. C.*, and *Agnew*, for defendants, cited as to the right to recover interest: *De Havilland v. Bowerbank*, 1

Camp. 50 ; *Crockford v. Winter*, Ib. 129 ; *Catton v. Bragg*, 15 East 224 ; *Higgins v. Sargent*, 2 B. & C. 348 ; *Gordon v. Swan*, 12 East 419 ; as to the mode of ascertaining the assessed value, with reference to the claim for 1869 : *Scott v. School Trustees of Burgess*, 21 C. P. 401 ; as to the other points in the case : *Reg. ex rel. Arnold v. Wilkinson*, 5 P. R. 20 ; *Campbell v. Corporation of York and Peel*, 26 U. C. R. 635 ; S. C. 27 U. C. R. 138 ; *Ekins v. Corporation of Bruce*, 30 U. C. R. 38.

WILSON, J.—I shall not go over this case again, as it has already been very fully considered. I shall only dispose of the questions which arise upon the finding of the learned arbitrator, Christopher Robinson, Q. C., who has ably and satisfactorily found and disposed of all the controversial facts in litigation.

As to the years 1855 and 1856, I am of opinion the plaintiffs cannot recover for them, because these amounts over and above the sums which were charged by the plaintiffs and paid by the defendants, were never at any time ascertained, determined, and demanded according to the statute, as the plaintiffs have alleged, and which the defendants have traversed.

As to the year 1857, which cannot exceed the sum of \$260—that being the sum which was claimed by the plaintiffs from the defendants shortly after the end of that year, I think it may be recovered, if not defeated on other grounds as afterwards mentioned, upon the finding of the arbitrator, and on the exhibit C. which was produced and filed. It was demanded and ascertained, and there was no other sum than that which there is any pretence for saying was ascertained, determined, and demanded. The defendants never levied that amount.

As to the year 1858, limited for the reason applicable to 1857, to \$262.31, it stands in the same position as the claim for that year ; but the claim for 1858 was actually levied by the defendants, and for it the plaintiffs may recover, subject to what is hereinafter mentioned.

As to the year 1859, limited for the like reason to \$243.13, there was no positive proof that it had been demanded or ascertained, but the defendants actually levied it, which is very strong evidence of the amount having been duly ascertained, and determined, and demanded; and for it the plaintiffs may recover, subject to what is hereinafter mentioned respecting it.

For the years 1860 to 1864, both inclusive, the plaintiffs cannot recover, because these yearly sums were not ascertained, determined, and demanded according to the statute. There was a special agreement between the parties made on the 5th of March, 1860, under which the defendants were to pay the plaintiffs \$2,400 yearly for certain matters, and under which the defendants contended they were not to be liable for the demands now made in respect of the jury expenses for the years in question. I do not say that agreement afforded or affords any defence; but it explains why no demand was ever made of the sums now claimed for these years.

As to all these years—that is, from 1855 to the end of 1864—the defendants are entitled to succeed upon the issue found on the fourth plea, because it appears the assets of the united counties of Frontenac, Lennox, and Addington were not assigned to the plaintiffs, as in the first and second counts alleged.

For the year 1865 no claim is now made, as it appears it was duly paid.

As to the year 1866, it appears the true amount the defendants should have been called upon to pay was \$1,209.97; but, instead of that, they were called on in June, 1867, to pay, and did pay \$877.42, leaving the sum of \$332.55, which the plaintiffs demanded from the defendants in April, 1868. This sum appears to be rightly due, and I do not see any reason why the plaintiffs should not recover it.

As to the years 1867 and 1868, the plaintiffs make no demand for principal money, for that has been paid; but they claim interest, under the following circumstances:—



The demand for 1867 was \$1,917.11. That sum was duly ascertained and demanded in April, 1868. The defendants levied the sum due for 1867. They did not pay it to the plaintiffs, but applied it to other purposes.

The claim for 1868 was \$2,290.83. That sum was duly ascertained and demanded in April, 1869. The defendants, having spent the claim raised for 1867, levied in 1869 for the two years 1867 and 1868, which the defendants paid to the plaintiffs on the 20th of September, 1869, by a promissory note at three months, in which note \$81.25 was included for discount. The plaintiffs then claimed interest on the arrears, but it was not paid, and the county treasurer gave a receipt for these years on that day, and no further demand for such interest has been made. The sum demanded for the arrears of interest is \$294.

There is no reason in law why the plaintiffs should not recover that sum.

As to the year 1869, the plaintiffs claim \$1,827.71. The defendants admit only \$1,405.68. The difference of \$421.73 is the sum really in dispute. The defendants have paid no part of the demand.

Whether the defendants should pay the larger or smaller sum depends upon the manner in which, for the purposes of these jury expenses, the assessed value of the city of Kingston should be made up.

Under the assessment law before 1866 property in counties and townships was assessed at its *actual* value, and in cities and towns at its *annual* value. The annual value was ascertained by taking, under the express directions of the statute, six per cent. of the actual value.

Under the 18 Vic. ch. 130, which is now embodied in the Jury Act Consol. Stat. U. C. ch. 34, secs. 155, 156, 157, the portion of jury expenses to be borne by the City and County respectively, was to be in proportion to the assessed value of all the ratable property in each, and it was declared that in comparing the value of the ratable property in any city or town, and county for the purposes of the Act, "the assessed annual value shall be held to be ten per cent. of the actual value."



So that, although for the general city purposes property was to be rated at an annual value of \$6 on an actual value of \$100, yet as between the city and the county for jury expenses the annual value of the city property was to be deemed to be ten per cent. of its actual value, which would make the actual value of city property for this purpose ten times six per cent., or 60 per cent, [instead of 100 per cent,] of its actual value.

The effect of this was to reduce city property, which was usually rated very much higher than county property, by throwing off 40 per cent of its actual value, and to make 60 per cent of the actual value represent the total actual value. It was the mode adopted to equalize the rural and the city rating.

By the act of 1866 real and personal property were to be estimated at the actual value in all Municipalities. There is no way now of ascertaining what the annual value is. We have no means by which we can fix it at six per cent., or at any other percentage of the actual value. There is now no assessed *annual* value of property in any city, and if it cannot now be taken to be ten per cent. of the actual value, the liability must be "in proportion to the assessed value of all the ratable property in each," under Consol Stat. U. C. ch. 31, sec. 155, sub-sec. 2. In my opinion sub-sec. 3 of that section can no longer be applied, because there is no assessed annual value on which it can operate.

This point was disposed of in the judgment given on demurrer, but Mr. Agnew was so strong in his opinion that he could still maintain his view, that we heard his argument upon it. We are not able to adopt it, It should be provided for afresh, as it was no doubt an oversight in changing the system of rating.

As to the year 1869, the plaintiffs are entitled to recover as the law now stands, the larger sum of \$1,827.71, increased by interest to \$1,876.

The issues should be disposed of as follows :

The first issue for the plaintiffs as to the third count

\$332.55; as to the fourth count \$1,828.71, and as to the fifth count for the three sums of interest :

\$60 on the sum of \$332.55.....	\$60.00
\$48.29 on the sum of \$1,827.71.....	48.29
\$294 on the two years of 1867 and 1868.....	294.00
	<hr/>
	\$402.29

The second issue to be applied in the same distributive manner as the first issue.

The third issue for plaintiffs on the first count, on the third count, and on the fourth count, and for defendants on the second count.

The fourth issue for defendants.

The fifth issue for the plaintiffs as to the first count, as to the years 1855, 1856, 1858, and 1859; as to the third count as to 1865, and 1866; as to the fourth count, for 1867, and 1868; and the residue of the issue for defendants.

The sixth issue for plaintiffs as to the first, third, and fourth counts; and for defendants as to the residue.

The issue on the Statute of Limitations on the common counts, for the plaintiffs.

The last issue for the plaintiffs—that the defendants did and do still hold real property not acquired, required, or used for municipal purposes, sufficient to meet the plaintiffs' demands in this suit.

MORRISON, J., concurred.

*Judgment accordingly.*

## WATTS V. ROBINSON ET AL.

*Claim against partners—Dissolution—Acceptance of note of the new firm—Stamps—Estoppel—Pleading.*

Declaration against R. & H. for goods sold. Plea by defendant H., on equitable grounds, in substance, that he and R. purchased the goods while in partnership: that afterwards he retired, W. taking his place, and R. & W. assuming the debts of the old firm, including this claim; and that the plaintiff, being aware of this arrangement, took the note of the new firm, R. & W., for his debt. *Held*, a good plea.

The third plea alleged that the plaintiff had notice of the arrangement, as in the former plea; and that, in consideration that W. would assume the liability of H. for this debt, the plaintiff accepted R. & W. in place of defendants, and took their note, and relinquished his claim against H. *Held*, good.

The fourth plea averred satisfaction of the plaintiff's claim by the delivery and acceptance of the note of R. & W. *Held*, clearly good.

The plaintiff replied to these pleas, that the note was not duly stamped, the stamps thereon not having been properly cancelled. *Held*, bad, for the plaintiff could have made the note valid by affixing double stamps, and could not take advantage of his own neglect to do so.

DECLARATION on the common counts.

Defendant Robinson suffered judgment by default.

Second plea, on equitable grounds, by defendant Howell, that, before and at the time of the alleged contracting of the debt in the declaration mentioned he was a member of the firm of Robinson & Howell, doing business at the Town of Goderich, in the County of Huron, as general grocers, and that the goods sued for herein were contracted for by said firm for, and applied to the purposes of, the said firm, and not the use or the individual benefit of the said Howell: that subsequently it was agreed between the said defendant Robinson and him, the said Howell, and one James Wilkinson, that he, the said Howell; should assign, transfer, and deliver over to the said James Wilkinson his right, title, and interest in the said business, and the stock-in-trade, book debts, notes, and other property therein or belonging thereto, in which he, the said Howell, had any right, title, or interest as such partner as aforesaid, and the said James Wilkinson, with the concurrence of the said defendant William Robinson, became possessed of the interest of the said Howell therein; and, as the consideration for his, the

said Howell's, assigning and transferring his partnership interests aforesaid to the said Wilkinson, the said defendant Robinson and the said James Wilkinson undertook and agreed with the said Howell to assume the payment of the debts of the said firm of Robinson & Howell, and among such the plaintiff's debt herein, of which the plaintiff had notice: that thereafter the plaintiff, with knowledge of the premises, took and accepted from the said defendant Robinson and the said James Wilkinson their joint promissory note for the amount of the said claim, payable four months after date and at the time of the commencement of this suit held the same against them: that up to the time of, and for a time long after the making of the said promissory note by Robinson and Wilkinson, the plaintiff never asked for payment of the said debt of him, the said Howell: that if, after notice to the plaintiff aforesaid of the assumption of the payment of the said debt by the said Robinson and Wilkinson, the said plaintiff had notified him that he was still considered liable for said debt, and had not accepted Robinson and Wilkinson as his, the plaintiff's, debtors instead, he would have been in a position to protect himself against payment thereof; but by reason of the plaintiff's conduct in the premises, the position of him, the said defendant Howell, was altered and prejudicially affected, and the said Robinson and Wilkinson have become unable to meet their liabilities generally, whereby the defendant Howell says that it would be inequitable for him to be called on now to pay the plaintiff's claim.

Third plea, by defendant Howell: that the plaintiff's debt was contracted during the time that he was a member of the firm of R. & H., doing business as grocers at the Town of Goderich, in the County of Huron, and for goods supplied to the said firm for the purposes of said business, and for no other: that it was agreed between the said defendants and one W. that he, the said Howell, should sell out his interest in the said business, and everything connected therewith, to the said W., and that the



defendant Robinson and the said W. should assume payment of the plaintiff's debt instead of the said defendant Howell, of which the plaintiff had notice: that in consideration that the said W. would assume the liability of him, the said defendant Howell, for the payment of the plaintiff's debt, the plaintiff agreed to and did accept the responsibility of the said R. and W. in the place and stead of the said defendants, and accepted the promissory note of the said R. and W. for the amount of said debt sued for, who alone became his debtors, and the plaintiff did thereby relinquish and abandon his said claim against him, the said Howell.

Fourth plea, by defendant Howell: that before action the plaintiff's claim was satisfied and discharged by the delivery to and acceptance by the plaintiff of a promissory note for the sum of \$456.71, made by the firm of Robinson & Wilkinson to the plaintiff, dated on or about the 3rd day of November last, and payable four months after date, which note the plaintiff accepted and received in satisfaction and discharge of the plaintiff's claim.

Replication to the second and fourth pleas: that the promissory notes therein mentioned are one and the same note: that the said note was made in Canada, to wit, in the Province of Ontario, and was not made upon paper stamped in the manner provided by the Act 31 Vic., ch. 9, or the amendment thereof: that the said note bore date the 3rd day of November last, but was made on a different date from the date of the said note, on, to wit, the 17th day of January, 1871: that stamps of the value required by law were then affixed thereto, but that none of such stamps were ever cancelled in accordance with the provisions of the statutes in that behalf, but such stamps were cancelled in no other way than by writing thereon the figures 3, 11, 71, and that no stamps of double value were at any time placed upon said note by any of the parties thereto, or by any holder or holders thereof, or by any person or persons whomsoever, whereby the said note was and at all times continued to be invalid, and of no effect in law or in equity.

Replication to the third plea : that the plaintiff did not agree to accept, nor did he accept, the responsibility for his said claim of the said Robinson and Wilkinson therein mentioned, in the place and stead of the defendants, further than or in any other way than this—namely, that he received from the defendant Robinson the promissory note in said plea mentioned. The replication then alleged that his note was not properly stamped, as in the previous replication.

Demurrer to the replications, on the grounds :—1. That the said replications shew no facts which invalidate said promissory notes. 2. That the said notes were properly cancelled according to the statutes in that behalf and to custom. 3. That the said replications only shew facts which might render the parties thereto liable for the penalties prescribed by statute.

The plaintiff joined in demurrer, and excepted to the pleas on the grounds :—As to the second plea, that it does not allege that the promissory note therein referred to was given by the defendant Robinson and the said James Wilkinson and accepted by the plaintiff in satisfaction and discharge of the claim sued for herein ; that, so far as appears from said plea, the promissory note therein referred to was given and accepted as collateral security for the payment of the claim sued on herein ; that it does not appear by such plea that the defendant Howell was, or how he was, prejudicially affected by the facts on which he relies to preclude the plaintiff from suing on his claim herein.

As to the third plea : that it does not shew any consideration for the plaintiff accepting the responsibility of the said R. & W. therein mentioned in the place and stead of the defendants, and the said note therein referred to, for the amount of the debt sued for herein ; that it does not appear with whom the alleged agreement to accept the responsibility of the said R. and W. or the note in said plea referred to, was made.

As to the fourth plea : that it does not appear that the

firm of R. and W. therein mentioned had any prior authority from the defendants, or either of them, to give said note in satisfaction and discharge of the claim sued on herein, or that the defendants, or either of them, ratified the giving of such note for the purposes therein mentioned.

There was also a special rejoinder to the replication to the second and fourth pleas, which rejoinder was demurred to, but it is considered unnecessary to set it out here, as its sufficiency was not determined.

*W. N. Miller* for the plaintiff. The note was clearly void under the Stamp Act: *Young v. Waggoner*, 29 U.C.R. 35; and being rendered void by contravention of the Statute, the plaintiff was not estopped from setting up its invalidity: *Doe Chandler v. Ford*, 3 A. & E. 649; *Nixon v. Albion Marine Insurance Co.*, L. R. 2 Ex. 338; *Tay. Ev.* 4th Ed. 105. The note therefore being avoided, the plaintiff is remitted to his original position, and entitled to sue for the goods. As to the defence generally, he cited *Lindley on Partnership*, 2nd Ed., 442-3; *Booth v. Ridley*, 8 C.P. 464; *Kemp v. Watt*, 15 M. & W. 672.

*C. Robinson*, Q.C., contra. Admitting the note to be invalid, the plaintiff could have given it validity by affixing double stamps, and having accepted it as it was, he cannot set up his own neglect as an answer to the pleas. As to the sufficiency of the pleas, he cited *Kearslake v. Morgan*, 5 T. R. 513; *Mercer v. Cheese*, 4 M. & G. 804; *Belshaw v. Bush*, 11 C. B. 191; *Thompson v. Percival*, 5 B. & Ad. 925; *Henderson v. Stobart*, 5 Ex. 99; B. & L. Prec., 3rd Ed., 540, notes.

MORRISON, J.—In this case the defendant Howell demurs to the second and third special replications of the plaintiff to the second, third, and fourth pleas of the defendant Howell; and the plaintiff takes exception to those pleas.

As to the exceptions taken to the second plea, I am of opinion that they ought not to prevail against it as an

equitable plea. The plea amounts to this: that the defendants were partners: that the defendant Howell retired from the partnership, one Wilkinson taking his place in the partnership, Wilkinson agreeing to pay the debts of the old firm, among them the plaintiff's debt; and that the plaintiff, being aware of these arrangements, took the note of the new partners in payment of his debt.

In *Kirwan v. Kirwan*, 2 C. & M. 627, Baron Parke, in giving judgment, says: "The law is perfectly clear up to a certain point. It is clear that all the three brothers were originally responsible for this debt; and it is equally clear that, when that was proved, it was incumbent upon them to discharge themselves from that joint liability. They might do this by proving payment, or something equivalent to payment, or an agreement with the plaintiff to accept the responsibility of a new firm, in place of the old firm."

And the same learned Judge, in *Hart v. Alexander*, 2 M. & W. 493, says, in his judgment in that case: "I apprehend the law to be now settled, that, if one partner goes out of a firm, and another comes in, the debts of the old firm may, by the consent of all the three parties—the creditors, the old firm, and the new firm—be transferred to the new firm."

It seems to me that this plea discloses the facts stated by Parke, B. See *Evans v. Drummond*, 4 Esp. 39; *Thompson v. Percival*, 5 B. & Ad. 925; *Belshaw v. Bush*, 11 C. B. 191; *Bailey v. Flower*, *Bank of Australasia v. Flower*, L. R. 1 P. C. 27; *Harris v. Farwell*, 15 Beav. 31; *Lyth v. Ault et al.*, 7 Ex. 669.

The same remarks apply more strongly to the third plea.

As to the fourth plea, I see no objection; I think it is a good plea of accord and satisfaction.

Then, as to the replication to the second and fourth pleas, I think it is bad. The second plea alleges the taking of the note mentioned in payment of the claim in the declaration; and the plaintiff, by his replication,



attempts to avoid the defence set up by the plea by saying: "True it is, I took the note in payment; but, as the stamps required by law were not properly affixed to it or cancelled, it was of no value to me, and so I am remitted to my original rights." Now that is not necessarily the consequence, for the plaintiff having taken the note as alleged, of his own act, either at the time he received the note, or as soon as he acquired a knowledge of the defective stamping or cancellation, could have given validity to the note (and, assuming he was not the payee, without becoming a party to the note) by affixing double stamps, as authorized by the 12th section of the Statute of the Dominion, 31 Vic., ch. 9; and the plaintiff having accepted and taken the note, and retaining the same, it became the duty of the plaintiff to affix the proper amount of stamps to it, or render himself liable to the penalty imposed by the Act. It seems to me that through his own neglect the note was rendered of no value, and I do not think the plaintiff should be allowed to set up or take advantage of his own laches, omission, or neglect, to defeat the plea and defence of the defendant Howell, who was not a party to the note, and had no control over it. For the like reasons, I think the replication to the third plea is also bad.

As to the replication to the fourth plea, the same observations apply, except in that plea the plaintiff appears to be the payee of the note, and it certainly became his duty, under the statute, to affix the proper stamps for the duty or double duty, at the time he received the note in payment.

On the whole, I think the defendant is entitled to our judgment on demurrer. The replication being held bad, it is not necessary to consider the effect of the rejoinder.

WILSON, J., concurred.

*Judgment for defendant.*

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MULHOLLAND V. ROBERT BROOMFIELD AND ROBERT  
McDOUGALL.

*Principal and surety—Discharge of surety by giving time—Construction of agreement—Reservation of rights against surety.*

To a declaration on two promissory notes and a mortgage made by defendants they pleaded, on equitable grounds, that they made the notes, &c., as security only for one J. McD., and upon the terms of an agreement set out, which provided that upon J. McD. making certain payments in a given time, and giving these notes and mortgage, the plaintiffs would release J. McD. from his indebtedness. It also contained a stipulation that the securities now sued on were to be regarded as so much additional value to J. McD.'s assets, and defendants were not to be indemnified or reimbursed in respect of them under penalty of relieving the plaintiff from carrying out the agreement. The plea then alleged that the notes and mortgage were made and accepted on the faith of this agreement, and that subsequently, without the privity or consent of defendants, the plaintiff and J. McD. entered into a new arrangement, set out in the plea, by which the indebtedness of J. McD. was fixed at a new and larger sum, which the plaintiff agreed to accept in full of all claims against him and his sureties; part of this sum was to be paid in money at a future day, additional securities were handed over and promised to the plaintiff, and other and prolonged times were fixed for the payment, and it was stipulated that on the securities being completed and said money paid according to this agreement, the plaintiff would hand over and release all other securities held by him. The defendants alleged that this last agreement was taken in satisfaction of the first, and that the defendants were thereby released from liability by such extension of time. The plaintiff replied that the defendants had been indemnified contrary to the terms of the first agreement.

*Held*, on demurrer, that the plea was good: that the stipulation against the indemnity of defendants could not deprive them of their rights as sureties: that there was not in the second agreement any reservation of the plaintiff's rights under the first; and that without such a reservation distinctly expressed defendants were discharged.

*Held*, also, replication bad, for that the stipulation relied on applied only as between the principal debtor and the plaintiff, and the breach of it could give no right of action against defendants.

DECLARATION on two promissory notes made by defendants Robert Broomfield and Robert McDougall, payable to order of one John McDougall and endorsed to the plaintiff, and on a mortgage made to the plaintiff by defendants. Common counts added.

Fourth plea, on equitable grounds, as to the 1st, 2nd, and 3rd counts: that defendants made the notes and mortgage solely as sureties for said John McDougall, and upon the

terms and faith of the agreement set out below, and the said notes and mortgage were so accepted by Mulholland and Baker named in said agreement, and the plaintiff now sues on behalf of said Mulholland and Baker.

“ Montreal, 24th July, 1867.

“ Mr. John McDougall, of Waterloo, C. W., is now indebted to us, as per statement rendered, in the sum of \$12,308.80, with interest from the seventh of May last, errors and omissions excepted. On account of this we hold from him, part in our own hands and part in the hands of Messrs. McGachen and Colquhoun, customers' notes for about \$3,000. We also hold three notes signed by himself and Moses Springer for \$1,333.25 each, payable in six, twelve, and eighteen months from the 22nd June, 1867, \$3,999.75. We also hold as collateral security for the due payment of the above indebtedness, and the further sum of composition notes hereinafter referred to, two promissory notes signed by Messrs. McDougall and Broomfield for \$1,000 each, one at six months from 14th June, the other at eighteen months from 15th June last, payable to the order of and endorsed by the said John McDougall, \$2,000, and a mortgage made by Robert McDougall and Robert Broomfield of Galt, in favour of Henry Mulholland (one of our firm) dated 26th June, 1867, on the west end of lot 1, con. 3, Township of Waterloo, containing 150 acres, for \$1,000, payable in two years, and \$1,000 payable in three years without interest—\$2,000. The condition being that we are to endorse the said Mr. John McDougall's promissory notes for 8s. 9d. on the £, being the composition on sums due to his other creditors, the gross amount being about \$4,962, and that if within three years from this date the said Mr. John McDougall reduces his total indebtedness to us, including the endorsements and subsequent purchases, to \$3,000, we shall grant him an acquittance and discharge for \$1,500 of this sum, and deliver to him or to his order any and all securities or collaterals which we may then hold, and in the meantime the conditional \$1,500 is to remain without interest. It is further agreed that the said Mr. John McDougall shall pay to us on account of the balance of \$12,308.80, within one year from this date, \$5,000, and within two years from this date the further sum of \$3,000, and within the following or third year he shall reduce by payments the balance to the limit (\$3,000) stipu-



lated in the foregoing part of this agreement. It is perfectly well understood, and forms an essential part of this agreement, that the security given by Robert McDougall and Robert Broomfield of Galt, and by Moses Springer of Waterloo, is given as forming so much additional value to the assets of the said John McDougall: that neither of the said sureties is to be reimbursed or indemnified, directly or indirectly, in whole or in part, by the said John McDougall or out of his estate, under penalty of at once relieving us from carrying out our portion of this agreement; but the said John McDougall binds himself to carry on his business in the usual and regular way, and to keep a correct cash account of all receipts and disbursements, and to employ all his estate in meeting his ordinary liabilities as they mature—the whole under like penalty. We are at all reasonable hours to have permission to examine the cash book and other books connected with the business.

“MULHOLLAND & BAKER.”

“I have perused the foregoing agreement, and hereby confirm and approve of the same, and agree thereto.

“JOHN MCDUGALL.” :—

That afterwards, and before the expiration of the three years mentioned in said agreement, the following agreement was entered into :

“Montreal, 5th April, 1869.

“We hereby agree to accept from Mr. John McDougall of Waterloo, the sum of \$13,500 in full of our claims against him and his sureties to us, to be paid in the following way. We have now received the following notes, viz. :

“F. Fairman’s notes, endorsed by Messrs. Morland Watson & Co., due between 14th July, 1870, and 14th July, 1871.....	\$4,969.00
“The following to be sent to us within ten days from this date: F. Fairman’s notes, endorsed by John McDougall, due between 11th July, 1869, and 11th April, 1870.....	3,731.00
	<hr/>
	8,700.00
Less discount, say.....	700.00
	<hr/>
“Say net this day, eight thousand dollars .....	\$8,000.00
“A mortgage on property at Doon Mills, to be executed in our favour within a month, payable within two years, with interest annually at 7 per cent. ....	600.00



" A similar mortgage on lot at Berlin, known as the cricket ground, payable within two years, with interest at 7 per cent., as above.....	1,000.00
" And the balance, of two thousand nine hundred dollars, with interest as above, by 1st January next .....	2,900.00
	<hr/>
	\$13,500.00

"The two lots are to be free of all incumbrances, except a mortgage for \$200 on the Berlin lot, and on the completion of these mortgages and delivery of the \$3,731 in notes, and the payment of the \$2,900, with interest, in cash, we agree to hand over and release all other securities held by us.

" MULHOLLAND & BAKER.

" I hereby confirm this agreement.

JOHN MCDUGALL.

" I further agree to execute to Mulholland & Baker a mortgage on the paint bed in Winterbourne, in the Township of Woolwich, for the sum of fifteen hundred dollars, payable two years after date, without interest.

" J. MCDUGALL."

That the last agreement was made and accepted by plaintiff and Baker in lieu and satisfaction of the first, without the knowledge or privity of defendants, and the time for John McDougall to pay was extended by the second agreement; whereby defendants became discharged.

The plaintiff demurred to this plea, on the grounds—

1. That it appears by the plea that plaintiff reserved his rights against the defendants in the agreement of April, 1869, until payment by John McDougall.

2. The agreement of April, 1869, did not affect defendants as sureties, because by the agreement of 1867 the defendants were not to be indemnified by John McDougall, until the plaintiff was paid.

3. That as the notes and mortgage were overdue when the agreement of 1869 was made, the right of action which had accrued was not affected by it.

4. The plea was no answer at law or in equity, because it sought to vary a deed by parol, and set up matter inconsistent with the terms of it.

The plaintiff also replied to the plea, on equitable grounds, that defendants had been indemnified and reimbursed by John McDougall out of his estate, contrary to the terms of the agreement of 24th July, 1867.

The defendants took issue on, and demurred to this replication, on the grounds—

1. That the stipulation as to the reimbursement or indemnification did not affect defendants, and was intended only to give the plaintiff an additional remedy against John McDougall.

2. That the indemnification would not revive the liability of defendants.

*C. S. Patterson*, for the plaintiff, cited *Bailey v. Edwards*, 4 B. & S. 761; *Price v. Barker*, 4 E. & B. 760; *Bateson v. Gosling*, L. R. 7 C. P. 9.

*Moss*, for the defendants, cited *Dickson v. McPherson*, 3 Grant 185; *Greenough v. McClelland*, 2 E. & E. 424, 429; *Davies v. Stainbank*, 6 DeG. M. & G. 679; *Webb v. Hewitt*, 3 Kay & Johns. 438; *Clarke v. Henty*, 3 Y. & Coll. 187; *Padwick v. Stanley*, 9 Hare 628.

MORRISON, J.—In the first agreement, set out in the plea, the debt of John McDougall, the debtor, is stated as settled at \$12,308, which amount it is stipulated he was to pay as follows: \$5,000 within one year thereafter; within two years, a further sum of \$2,000; and within the third year, that is, before the 24th July, 1870, he was to reduce the whole of his debt to \$3,000; the plaintiff and Baker agreeing, if he should so reduce his debt in that period, to discharge him, in that case, on paying \$1,500, and to deliver to him any and all securities or collaterals which they might then hold.

The agreement stated that the securities given by these defendants were given as forming so much additional value to the assets of John McDougall, and that neither of the defendants was to be indemnified directly or indirectly by John McDougall, or out of his estate, *i. e.*, out of his property or assets, or the proceeds of his business, to all of which the plaintiffs looked for payment of their debt. John McDougall bound himself to carry on his business in the usual and regular way, and to employ all his estate in meeting his ordinary liabilities, as they matured, under a penalty of relieving the plaintiff and Baker from carrying out the agreement on their part.

Now what I take to have been the object and meaning of this stipulation is this : it was to guard against John McDougall and these defendants rendering, in effect, these notes and mortgages sued on as additional securities nugatory, by John McDougall providing means to meet them out of the proceeds of his business or assets, which it was agreed and intended should be applied and go to the plaintiff in payment of his debt, as settled by the agreement. It was not intended thereby, in my opinion, to deprive the defendants as sureties of any of their legal or equitable rights or remedies ; but the stipulation was introduced as a precautionary one, to impel McDougall to deal honestly with the plaintiff.

McDougall failing, or being unable to carry out such agreement, the plaintiff, before the expiration of the time limited by it for its fulfilment, on the 5th April, 1869, without the knowledge, privity, or consent of the defendants, entered into an entirely new and different agreement with McDougall for the payment of his debt.

By this new agreement the plaintiff agreed to accept \$13,500 in full of all his claims against John McDougall *and his sureties*, taking in part payment from McDougall promissory notes of certain parties to the amount of \$4,963, maturing between the 14th July, 1870, and July, 1871, and which notes he received at the time of the making of the agreement, \$3,731, in notes of others endorsed by John McDougall, maturing between 11th July, 1869, and 11th April, 1870, and mortgages on real estate, made by McDougall to the plaintiffs, for \$3,100. These latter notes and mortgages were to be delivered and made within ten days and one month respectively, and the balance to be paid in cash on the first January, 1870. And the plaintiff agreed, on delivery of these notes and mortgages, and the payment in cash as stated, to hand over and release all other securities held by him.

The plea avers that the agreement of the 5th April was made by John McDougall with and accepted and received by the plaintiff, in lieu of and in satisfaction and discharge of the first agreement.

Now, taking these two agreements and the several averments in the plea, the question is, whether, by the plaintiff thus varying the mode of and extending the time for the payment of the debt due by John McDougall as settled by the first agreement, or by reason of the plaintiff accepting the agreement of the 5th April in satisfaction of the first agreement, the defendants are discharged as sureties from the payment of these notes and mortgage.

The plaintiff contends that by the second agreement his rights against the defendants were in no wise altered : that the plaintiff's remedies against the sureties for the payment of the debt under the first agreement were reserved, and that they were therefore not discharged. And, in support, the cases of *Bailey v. Edwards*, 34 L. J. Q. B. 41 ; S. C. 4 B. & S. 761 ; *Price v. Barker*, 4 E. & B. 760, and a late case, *Bateson v. Gosling*, L. R. 7 C. P. 9, were cited.

In all these cases the law is clearly laid down, that to entitle the plaintiff to our judgment it must appear that his entering into the agreement of the 5th April did not operate as a discharge and extinguishment of the first agreement, and that the right of the plaintiff as against the sureties under the first agreement was preserved.

In *Bailey v. Edwards*, Blackburn, J., in delivering the judgment of the Court, said :

“ The principle upon which the Courts of Equity have proceeded appears to be this ; a surety has, as such, a variety of rights : amongst others, he has the right in equity to call upon the creditor to enforce all his, the creditor's, remedies against the principal debtor for the surety's benefit, and at the surety's risk and expense, \* \* and, if the creditor wilfully deprives the surety of this right, he so far alters the surety's position. Lord Eldon, in his judgment in *Samuel v. Hawarth*, 3 Mer. 272, says that where time is given by virtue of a positive contract between the creditor and the principal, the surety is held to be discharged, for this reason, because the creditor, by so giving time to the principal, has put it out of the power of the surety to consider whether he will have recourse to his remedy against the



principal or not, and because in fact he cannot have the *same* remedy against the principal as he would have had under the original contract.'” And further on, Blackburn, J., quotes what is said by Williams, J., in *Strong v. Foster*, 17 C. B. 219: “If the creditor has voluntarily placed himself in such a position as to be compelled to say he cannot sue him (the principal debtor) he thereby discharges the surety. The case then falls within the general doctrine as to principal and surety, which equally obtains at law and in equity, that if the creditor does an act to alter the position of the surety he thereby discharges him.”

Now, in this case, John McDougall, the principal debtor, enters into an agreement to pay certain moneys at certain times to the plaintiff, and for the due payment thereof the defendants become sureties. The principal debtor fails for some reason to carry out his agreement, and the plaintiff, without the knowledge of the sureties, having settled the amount then owing by the debtor, McDougall, to him, at a sum which is greater than the debt stated in the first agreement, by a new agreement, based upon a good and different consideration, agrees to take the sum settled upon in full of the plaintiff's claim against McDougall and his sureties, payable in the manner above stated.

I cannot consider this new agreement as a mere giving of time to the principal for the debt mentioned in the first agreement, but I regard it as a new agreement upon a new settlement of accounts for the sum agreed upon to be paid, and made and taken, as averred in the plea, in satisfaction and discharge of the debtor McDougall's liabilities under the first agreement, which, for the purposes of the plea, is admitted by the demurrer.

If this is so, then, upon the principles which govern the relation of principal and surety, the defendants are entitled to our judgment.

But, assuming that the agreement of the 5th of April was not taken in discharge of the first, and that it was merely an arrangement and agreement for extending the time for payment of the debt of McDougall under the first

agreement, does it contain a reservation of the plaintiff's rights against the sureties?

In all the cases referred to on the argument, the rights of the creditors against sureties are specifically and clearly reserved in the instruments releasing or extending the time for payment by the principal debtor. And the Courts, to carry out the intention of the parties, in such cases, limited the words used to construing them to amount to covenants not to sue.

It is said by Willes, J., in *Bateson v. Gosling*, "It must, therefore, now be taken to be settled, that when the principal has entered into a deed of arrangement containing a release, subject to the reservation of the creditor's right of recourse against the surety, the latter has no right to raise the objection. If, however, there is an absolute and unconditional release, the remedy against the surety is gone, because the debt is extinguished." \* \* The debt being gone, no right of recourse against the surety could be reserved."

Is there then, in this agreement, such a reservation of remedies?

One mode of testing the effect of the second agreement would be, by considering whether the plaintiff and Baker after the making of that agreement could, without a breach of faith and contract on their part, have sued John McDougall for the non-payment of the sums mentioned in the first agreement.

I think not; and if these defendants as sureties had called on them to sue McDougall, they would have been bound to refuse it.

When the second agreement was signed the \$4,963 in notes of third parties was delivered to the plaintiff, and until the period elapsed for the delivery of the \$3,731 in notes, he could not sue John McDougall upon the first agreement, that is, assuming that it was never discharged; and there certainly was no reservation of remedies against the sureties during that period. The plaintiff's hands were tied up. And after these notes were given until the mortgages were

handed over, the agreement of the 5th April, being taken in discharge and satisfaction of the first agreement, all right of action under it was extinguished.

The provision at the end of the second agreement for the handing over and releasing to John McDougall all *other* securities held by the plaintiff indicated, it was argued, an intention to reserve the remedies of the plaintiff as against these defendants as sureties.

I cannot take that view of it. Assuming that the words, "other securities," refer to the notes and mortgage in question, still it does not amount to a reservation against the sureties. At most it amounts to a stipulation, that the plaintiff and Baker were not bound to deliver or release to John McDougall the documents or instruments deposited with them until McDougall had carried out his new agreement.

The agreement commences by accepting from the debtor McDougall \$13,500 in full of all claims against him and his sureties, clearly shewing that they were intended to be exonerated and discharged. If it were otherwise, the agreement, it is only reasonable to suppose, after that statement, would have specifically reserved remedies against them, were they to be liable under any contingency, notwithstanding the making of the new agreement.

We therefore think the defendants are entitled to judgment on the demurrer.

Then as to the demurrer to the replication to the plea. We also think the replication is bad.

The reimbursing or indemnifying the defendants by McDougall gave no right of action against them. That portion of the agreement is a provision or stipulation affecting McDougall, so that, in case *he* reimbursed or indemnified either of the defendants in whole or in part out of his estate, he would do so under the penalty, as the agreement expresses it, of relieving the plaintiff and Baker from carrying out their portion of the agreement: in other words, remitting them to their original rights and remedies against McDougall.

WILSON, J., concurred.

*Judgment for defendants.*



## CANADA LIFE ASSURANCE COMPANY V. O'LOANE.

*Libel—Plea of justification.*

The libel set out in the declaration, for which the plaintiff sued, alleged in substance that the plaintiffs, a Life Assurance Company, had lost heavily on debentures taken at par and nearly worthless, which they had nevertheless continued to value: that they were compelled by public opinion to call in an actuary, but prevented him from making a proper valuation: that their history was one of outrageous extravagance and dangerous debility: that for years they had trembled on the very verge of disaster; and that they were in an unsound and precarious condition, &c.

The plea to the whole declaration alleged only, in substance, that defendants had for several years made untruthful annual statements: that they had lost large sums of money by investments; and that they paid larger bonuses and dividends and salaries than their true financial position would justify. *Held*, that the plea did not justify all the material charges in the declaration, and that it was therefore bad.

## DEMURRER.

Declaration—First count: That the plaintiffs are a company duly incorporated under an Act of the late Province of Canada for exercising and conducting the business of effecting assurances on lives and other matters connected with life assurance, and have for many years carried on the said business with integrity and fair dealing, and punctually fulfilled their engagements; and the defendant, knowing the premises, at the time of the committing of the grievances hereinafter mentioned was the agent of another assurance company, and employed by them to solicit and procure business; and in the course of such employment, and in order to injure the Company in the estimation of the public, and to cause the imputation of mismanagement, misconduct, and insolvency in the libel hereinafter set forth to be believed, did falsely and maliciously circulate and publish of and concerning the plaintiffs, in relation to their business as an insurance company and the carrying on and conducting thereof, a certain false, scandalous, malicious, and defamatory libel, containing in one part thereof, purporting to be an extract from a letter to the New York *Spectator*, the false, malicious, libellous, and defamatory words following, that is to say:



“ They (meaning the plaintiffs) lost heavily in depreciation of city, town, county, and township debentures taken at par, and now almost worthless, and yet they have always been valuing until last year and this at six per cent. Agents of American companies, by their action on public opinion, compelled them last year, a year before their quinquennial valuation, to have Hon. Elizur Wright value their liabilities; but they tied his hands to five per cent. He protested, so as to clear himself of the responsibility, but gave them the valuation they wanted; and so again this year. I also send you a copy of the Company's rates, from which you will see they have but a very small loading or margin for expenses, and must be more than exhausting it as they go, between expenses, dividends to stock, and losses on investments.” And in another part thereof, purporting to be the editorial remarks of that journal thereon, the false, malicious, and defamatory words following, that is to say: “ It has taken the Canada Life of Hamilton, C. W., twenty-five years to be able to report an annual income of \$150,000, and an amount at risk of \$4,000,000. This, too, notwithstanding its bid for custom through the costly medium of low rates and disproportionate bonuses. Perhaps it has never occurred to the astute managers of the concern that common sense people are naturally shy of those who offer goods at less price than their respectable competitors. This sort of thing is generally found to be a losing game in the long run, and the record of the Canada Life verifies this, for its history has been one of outrageous extravagance and dangerous debility. For years the Company has trembled on the very verge of disaster, as the result of that charlatanism which is sustained at the expense of nearly all its income; but the canker is evidently eating into the vitals of the Company, and will soon complete its work.”

By means of which said several grievances by the defendant the plaintiffs have been greatly damaged in their reputation as an assurance company and their said business, and have been brought into public disgrace and

contempt, and the value of the property of the Company and the shares therein depreciated.

Second count—That the defendant, well knowing that the plaintiffs were carrying on the business of life assurance, falsely and maliciously spoke and published of them in relation to their said business, and the carrying on and conducting thereof by them, the false, malicious, and defamatory words following, that is to say: "The Canada Life (meaning the plaintiffs) are in an unsound and precarious condition," meaning thereby that the said company was unable to meet its liabilities, and an unsafe company to insure in, &c.

Third plea—That the plaintiffs had for many years past published annually a statement purporting to shew to those interested in the plaintiffs' company, and to the public generally, the financial position of the company, and with the object of shewing that the company was in a prosperous condition, and that it was a safe company for insurers; and in those statements the securities held by the company for investments, and the estimates of assets and liabilities, were usually calculated and estimated on the assumption that the company would realize from its investments interest at the rate of six per cent per annum; but large sums of money were invested by the company on insufficient security, and were thereby lost to the company, and such losses, or some part of them, were stated and shewn in the said published statements, and therein called "written off investments;" and by reason of such losses, amongst other reasons, the company did not realize from its investments interest at the rate of six per cent. per annum, but only at the rate of four per cent.; and the said annual statements did not truly shew the financial position of the company, but represented such position to be more prosperous than it was; and the said statements were therefore fallacious, and calculated to deceive the public, and to induce persons to effect insurances with the company in reliance upon the position untruly shewn by such statements; and the plaintiffs'

company has paid as dividends to stock holders, and as bonuses on policies, larger sums of money than the true financial position of the company would justify, and has paid, by way of salaries or allowances to its officers and servants, larger sums of money than the nature of their employment and the income of the company made necessary or proper, as well as sustaining losses by reason of insufficiently secured investments.

Demurrer, on the ground that the plea affords no answer to the matter to which it is pleaded, and, whilst professing to answer the whole declaration, affords an answer only to a part.

*Burton*, Q. C., for the demurrer, cited *Helsham v. Blackwood*, 11 C. B. 111; *Clarkson v. Lawson*, 6 Bing. 266, 587; *O'Brien v. Bryant*, 16 M. & W. 168; *Hilsden v. Mercer*, Cro. Jac. 677; *Young v. Murphy*, 3 Bing. N. C. 54

*C. S. Patterson*, contra, cited *Clarke v. Taylor et al.* 2 Bing. N. C. 654; *Tighe v. Cooper*, 7 E. & B. 639; *Jenner et al. v. A'Beckett*, L. R. 7 Q. B. 11; *Watkin v. Hall*, L. R. 3 Q. B. 396; *Morrison v. Harmer*, 3 Bing. N. C. 759.

MORRISON, J.—We are of opinion that the plea demurred to, which professes to justify the entire libellous matter set out in the declaration, fails to justify several material parts of the libel, and that the plaintiffs are entitled to our judgment for the insufficiency of the plea.

The libel, as set out, contains several distinct charges against the plaintiffs' company, all of them unquestionably libellous, imputing bad and extravagant management of its business, untruthful statements as to its condition and affairs, insolvency, and fraudulent expedients and means to sustain it; and the question raised by this demurrer is, whether the defendant by his plea has justified all the material libellous matter.

The libel charges that the plaintiffs lost heavily in depreciation of city, town, county, and township debentures taken by them at par, and stated now to be



almost worthless, and it charges further that the plaintiffs, nevertheless, have always been valuing them until last year at six per cent. It then states that agents of American companies, by their action on public opinion, compelled the plaintiffs last year to have the Hon. E. Wright value their liabilities, and charges that the plaintiffs tied that gentleman's hands to five per cent.; that he protested, to clear himself of the responsibility, but gave them the valuation they wanted. The libel further states that it took the plaintiffs twenty-five years to be able to report an annual income of \$150,000 and an amount at risk of \$4,000,000, notwithstanding its bid for custom through the costly medium of low rates and disproportionate bonuses; and then says that that sort of thing is generally found to be a losing game in the long run, and charges that the records of the plaintiffs' company verifies that result, alleging that its history has been one of outrageous extravagance and dangerous debility, that for years the company has trembled on the very verge of disaster, as the result of that charlatanism which is sustained at the expense of nearly all its income, but that the canker is evidently eating into the vitals of the company, and will soon complete its work. And the words charged in the second count are, that the plaintiffs' company is in an unsound and precarious condition.

As a justification of all these libellous charges, the defendant pleads in effect that for several years the plaintiffs made untruthful annual statements, with the object of shewing that the company was in a prosperous condition: that they lost large sums of money that were invested by the company on insufficient security: that such losses appeared in the published statements of the company as "written off investments," and that by reason of such losses the company did not realize interest at six per cent., but only at four per cent.: that the company paid larger dividends and bonuses than the financial position of the company would justify, and paid larger salaries and allowances to its officers and servants than



the nature of their employment and the income of the company made necessary or proper.

Now one has only to read the libel and the plea to see that the most material libellous matter is left entirely unanswered or justified. Nothing in the plea justifies the charge that the company lost heavily by depreciation of the specific kinds of debentures mentioned in the libel, or the statement of these debentures being almost worthless; nor does the plea in any way justify the imputation that the plaintiffs compelled or induced the Hon. E. Wright, the actuary, by their improper interference, to make a false valuation, or the statement that the records of the plaintiffs' company verifies its history as being one of outrageous extravagance and dangerous debility, or that for years the company has trembled on the very verge of disaster.

As said by Maule, J., in *Helsham v. Blackwood*, 11 C. B. 129, "When an action is brought for a libel, to make a good plea to the whole charge, the defendant must justify everything that the libel contains which is injurious to the plaintiff. If the libel charges several crimes, or the commission of a crime in a particular manner, the plea must justify the charge as to the number of the crimes, or the manner of committing the crime. If the crime is charged with circumstances of aggravation, as here, the plea is clearly bad if it omit to justify that."

Now in this case the several charges I have referred to, all of them injuriously affecting the credit and reputation of the company, are not met. It was argued that the substance of the libel was justified. I think otherwise. The plea falls short, and fails to meet the specific charges, and the substantial one of the imputation of insolvency, which are quite independent of the matters pleaded and are not necessarily or inferentially included in the general allegations spread on the plea.

The plaintiffs are entitled to judgment on the demurrer.

WILSON, J., concurred.

*Judgment for plaintiffs.*

## YOUNG V. VICKERS.

*Fraudulent representation, action, for—Pleading—Scienter.*

The declaration alleged that defendant, before the committing of the grievances, &c., was a carrier and express agent; that the plaintiff delivered to one W. a sum of money to be handed to defendant, to be carried and delivered to S., and that defendant falsely and fraudulently represented to the plaintiff that W. had delivered said money to him, whereby the plaintiff was satisfied of the fact, whereas in truth it had not been so delivered but appropriated by W. to his own use; and by reason of such false and fraudulent representation W. obtained time to and did abscond, and the plaintiff lost said money, [which he would otherwise have recovered from W.

*Held*, on demurrer, that a sufficient cause of action was shewn: that it was unnecessary to allege that defendant knew the representation to be false, the words *falsely* and *fraudulently* being equivalent to *knowingly*; or that defendant was a carrier at the time when, &c., for, the ground of action being the fraud, his being a carrier was immaterial.

DEMURRER to the third count of the declaration, which was as follows:—

That, before the committing of the grievances, the defendant was engaged in business as a carrier and express agent, and as such was used to receive parcels of money and valuable securities, to be delivered by him in the course of his business, for reward in that behalf. And the plaintiff, presuming the defendant to be so engaged in the said business, delivered to one Charles Wilkinson a large sum of money, to wit, \$1,500, to be given to the defendant, to be carried and delivered by the defendant to one Robert Stewart and Messrs. Thorne Brothers, for reward in that behalf to the defendant. And the said sum of money having been so delivered to the said Charles Wilkinson, the defendant falsely and fraudulently represented to the plaintiff that the said Charles Wilkinson had delivered the said sum of money to the defendant for carriage and delivery as aforesaid. Whereby the plaintiff was satisfied that the said Charles Wilkinson had so delivered the said money to the defendant for carriage and delivery as aforesaid, whereas, in truth and in fact, the said Charles Wilkinson had not so delivered the said money to the defendant, but had appropriated the same to

his own use. And the plaintiff says that, by reason of the said false and fraudulent representation of the defendant, the said Charles Wilkinson obtained time to abscond and did abscond from Canada, and the plaintiff lost the said money, which, except for such false and fraudulent representation of the defendant, he would have recovered from the said Charles Wilkinson.

The defendant demurred, on the following grounds:—

1. It was not shewn that the defendant, at the time of the alleged representation, was aware of the plaintiff's intention to take proceedings of any kind against the said Charles Wilkinson.

2. It was not shewn that the defendant made the alleged representation in any manner intending the same to be acted upon by the plaintiff.

3. It was not shewn that the defendant, by making the alleged representation, gained or intended to gain any benefit or advantage for himself.

4. The alleged representation was not such a representation as entitled the plaintiff to sue the defendant for damages.

5. It did not appear that the damages claimed were the necessary or natural result of the alleged representation.

6. The count did not disclose any cause of action against the defendant. Joinder.

in this Term *Duggan*, Q. C., and *Harrison*, Q. C., supported the demurrer. They referred to *Gerhard v. Bates*, 2 E. & B. 476, 488; *Behn v. Kemble*, 7 C. B. N. S. 260; *Cornfoot v. Fowke*, 6 M. & W. 358; *Barley v. Walford*, 9 Q. B. 197; *Addison on Torts*, 829, and contended that, in addition to the exceptions taken to the count, it was insufficient because there was no scienter averred throughout of any of the material facts to create a liability against the defendant: Bullen & Leake, 3rd ed., 333, and notes.

*J. H. Cameron*. Q. C., contra.—The averment that the defendant falsely and fraudulently made the representation to the plaintiff, by means of which damage was caused

to the plaintiff, shews a complete cause of action against the defendant: *Grant v. Norway*, 10 C. B. 665; *Barry v. Croskey*, 2 Johns. & H. 1; *Smith v. Kay*, 7 H. L. Cas. 750; *Higgins v. Burt*, 29 L. J. Ex. 165; *Collins v. Cave*, 4 H. & N. 225; *Bedford v. Bagshaw*, 4 H. & N. 538; *Clarke v. Dickson*, 6 C. B. N. S. 453.

WILSON, J.—The count, it will be observed, does not allege that the defendant was a carrier and express agent at the time when, &c., but that he was so *before* the committing of the grievances, &c. And the plaintiff, “presuming the defendant to be so engaged in the said business,” delivered the money to Wilkinson to be given to the defendant, to be by him carried and delivered for reward.

I think it makes no difference in the result, for if the action be maintainable on the ground of fraud, it must be so whether the defendant was such carrier or not; he was to carry for reward.

But if he had undertaken to carry gratuitously, the liability would be the same if he fraudulently and falsely affirmed a fact as true which was untrue, upon which the plaintiff was to act, and did act, and which the defendant knew to be untrue or did not know to be true.

I think the count does disclose in substance a good ground of action.

It appears to me that if a person, whether assumed by the plaintiff to be a carrier or not, falsely and fraudulently represents to the owner of a parcel of money given, as in this case, by the plaintiff to Wilkinson, to be by him delivered to the defendant for transmission to the consignees, for reward or without reward, that Wilkinson had delivered the parcel to him, the defendant, for the purpose aforesaid, when in fact he had not done so, and the plaintiff believed the defendant’s representation to be true, and sustained damage in consequence thereof, by reason of Wilkinson obtaining time to abscond and absconding from the Province without paying over the money, and which but for the false representation would



have been recovered from him, that a good cause of action is described.

If the defendant had in fact been a carrier, there would have been a duty on his part towards the plaintiff to tell him truly respecting the parcel which had been sent to him through Wilkinson. In such a case the mere falsity of the statement might have been sufficient to create a liability for the damage flowing from it, if the declaration had been framed for a breach of that duty: *Thom v. Bigland*, 8 Ex. 725; *Rawlings v. Bell*, 1 C. B. 951-960. It might have been the same if the defendant had held himself out to the plaintiff as a carrier when he was not so.

In the present case the liability is grounded upon the imputation of fraud. The rule which is applicable to it, as stated by Lord Campbell in *Gerhard v. Bates*, 2 E. & B. 488, is, "We consider it clear law that, if A. fraudulently make a representation which is false, and which he knows to be false, to B., meaning that B. shall act upon it, and B., believing it to be true, does act upon it, and thereby suffers a damage, B. may maintain an action against A. for the deceit; there being here the conjunction of wrong and loss entitling the injured and suffering party to a compensation in damages."

The question is, whether it is necessary the scienter by the defendant of the falsity of the representation should, when it is alleged to have been *falsely* and *fraudulently* made, be also averred in the declaration.

*Pasley v. Freeman*, 3 T. R. 51, in the judgment of Buller, J., and the reference he makes to 1 Roll. Abr. 91, pl. 7, are directly to the point, that *falsely* and *fraudulently* are equivalent to *knowingly*. He said the principal case "states more than is necessary; for *fraudulenter* without *sciens*, or *sciens* without *fraudulenter*, would be sufficient to support the action."

In *Collins v. Evans*, in the Ex. Ch., 5 Q. B. 820, it is determined that a statement false in fact, but not known to be so, is not actionable, and that *fraud* must concur

with the false statement in order to give a ground of action.

I understand the cases, although not very plainly expressed, to decide that a false affirmation by a person which he knows to be untrue, or which he has no knowledge of at all, made with intent to induce another to act upon it to his damage, and such person does act upon it, describes a good cause of action ; but, that if the affirmation be falsely and fraudulently made, and it is averred it was false in fact, it is not necessary to allege in pleading that the defendant knew it to be false.

*Evans v. Collins*, 5 Q. B. 804, was on a false representation, and was assumed, in p. 826 (*Collins v. Evans* in Error), to have sufficiently averred a knowledge of the falsity.

*Behn v. Kemble*, 7 C. B. N. S. 260, was a false representation merely, and was held bad because it stated neither a fraudulent representation nor a scienter.

In *Rawlings v. Bell*, 1 C. B. 951, the false affirmation was not accompanied with a scienter : it was an affirmation made by the defendants personally respecting their right and title to distrain, and it was held that "a statement false in fact, but not false to the knowledge of the defendants, nor made with an intention to deceive, will not support an action, unless from the nature of the dealing between the parties a contract to indemnify can be implied ; " and such a contract could not be inferred in that case, for one of the defendants was a married woman.

In *Childers v. Wooller*, 2 E. & E. 287, the first two counts, which were on a false representation without either a scienter or an allegation of fraud, it was said would have been bad because of the want of an averment of fraud.

In *Pasley v. Freeman*, 3 T. R. 51 ; *Barley v. Walford*, 9 Q. B. 197 ; *Taylor v. Ashton*, 11 M. & W. 401 ; and *Gerhard v. Bates*, 2 E. & B. 476, the declaration alleged a false and fraudulent representation, and that it was false in fact, and the defendant knew it to be so. Yet in

*Pasley v. Freeman*, as before mentioned, it was said that the scienter need not be stated where fraud was alleged.

And in *Taylor v. Ashton*, 11 M. & W. 415, it was said by Parke, B. : " But then it was said that, in order to constitute that fraud, it was not necessary to shew that the defendants *knew* the fact they stated to be untrue; that it was enough that the fact *was* untrue, if they communicated that fact for a deceitful purpose; and to that proposition the Court is prepared to assent. It is not necessary to shew that the defendants knew the fact to be untrue; if they stated a fact which was true" (should be untrue?) " for a fraudulent purpose, they at the same time *not believing* that fact to be true, in that case it would be both a legal and a moral fraud."

In *Polhill v. Walter*, 3 B. & Ad. 114; *Omrod v. Huth*, 14 M. & W. 651; and *Thom v. Bigland*, 8 Ex. 725, the representations were falsely and fraudulently made, and there was no allegation of scienter.

In *Polhill v. Walter*, the defendant, in asserting he had power to accept the bill in the name of the drawee, must have known that the statement he had made was, as Tindal, C. J., said in *Rawlings v. Bell*, 1 C. B., 959, in alluding to *Polhill v. Walter*, " false to the knowledge of the party making it."

Lord Tenterden seems to have been of opinion in that case that the averment of fraud was established by proving a statement to be untrue to the knowledge of the person making it, and that it was made to induce another to act on it to his damage.

In *Omrod v. Huth*, to prove the fraud, evidence of the defendant's *knowledge* of the facts (though not averred) was necessarily gone into.

In *Thom v. Bigland* it was held that the charge of fraud could not be struck out because the essence of the declaration was that the defendant was guilty of a fraudulent misrepresentation.

If the facts show a corrupt contract, the word *corruptly* as applicable to a simoniacal contract need not be used: *Goldham v. Edwards*, 16 C. B. 437.

So if *fraud* and *malice* be averred and be disproved yet if the declaration disclose a good cause of action independently of these allegations the plaintiff will be entitled to recover : *Swinfen v. Chelmsford*, 5 H. & N. 890-921.

So a scienter, though alleged, if not necessary to be proved, may be disregarded : *Williamson v. Allison*, 2 East 446, and notes.

I infer from these cases that if the false representation be relied upon (apart from all claim of duty or contract between the parties), it must appear on the face of the declaration that the defendant knew the representation to be false, and that he made it intending it should be acted on by the plaintiff to his damage, and that it was acted on accordingly : that if knowledge of the false representation be not averred, the count will be bad, unless from the situation of the parties and the nature of the transaction it is evident the defendant must have known his representation was false : that when the representation is charged to be false and fraudulent, the scienter need not be alleged ; it is sufficient that it should be false in fact.

Fraud is said by Cresswell, J., in *Crawshay v. Thompson*, 4 M. & G. 387, to consist "in knowingly asserting that which is false in fact, to the injury of another." And by LeBlanc, J., in *Haycraft v. Creasy*, 2 East 108, it is said, "By *fraud* I understand an intention to deceive."

The averment of *fraud*, I conceive, must carry along with it by implication these necessary concurring circumstances in the representation which must be *proved* to constitute a fraud.

According to the best opinion I can form, I think the count is sufficient in point of law, and that judgment must be given for the plaintiff on demurrer.

MORRISON, J., concurred.

*Judgment for plaintiff.*

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## HAYWARD V. GRAND TRUNK RAILWAY COMPANY.

*Appeal from C. C.—Certifying judgment—Lien of a packer.*

A packer has a lien upon the goods packed by him for the materials used and work done in packing.

The plaintiff employed one B. to pack some furniture and send it to him by defendants' railway. B. did so, and received his charges for packing from defendants, who were authorized by him to collect them: *Held*, that the defendants could legally retain the goods for these charges as well as for their freight, and that B.'s lien was not lost by delivering the goods to defendants for carriage subject to it, or by accepting the charges from defendants.

It is the duty of a County Court judge to certify to the Court above on an appeal the grounds of his decision. The statute is not complied with by certifying the decision simply.

## APPEAL from the County Court of Perth.

## Detinue for goods.

The plaintiff, having purchased certain articles of furniture in London, employed one Bennett to pack them and send them to him by the defendants' railway to Mitchell, and told Bennett he might either send his bill of charges by post to plaintiff at Mitchell, or get the amount of them from him when he came to London, which was generally at intervals of a week or two. Bennett packed the goods, finding the materials for packing, carted the goods to the station, and forwarded them by defendants' railway to Mitchell. He received the amount of his charges, \$5.75, from the railway company, and gave them authority to collect them. They included them with their charges for freight, \$1.20, and refused to deliver the goods unless the whole sum was paid. The plaintiff was only willing to pay the freight to the railway.

In answer to Bennett's letter, informing him of the shipment of the furniture, the plaintiff wrote him as follows: "Mr. C. Bennett, London.

"Sir,—I have your communication advising shipment of furniture. This has since arrived at the station here, of which I have received a freight advice note asking payment of freight charges, \$1.20, and \$5.75, amount of your bill for packing the latter. I have, of course, refused

to pay, as the understanding between us was, that you would either mail your account to me at Mitchell or wait till I happened to be in London again, which I informed you was very often, owing to my dealings with lumber merchants there. Therefore I consider your attempting to collect your account through the agency of the Grand Trunk Railway as a piece of unwarrantable impertinence, and an act that no respectable tradesman would have been guilty of after our conversation. I have placed the matter in the hands of my solicitors, and shall replevy my own property.

“Yours, &c.,

“L. HAYWARD.”

To this Bennett replied, on the 11th of July, in effect denying the understanding spoken of in the plaintiff's letter, and alleging that the plaintiff had suggested the modes he did suggest as two plans by which the account might be collected, but not as the only plans, and that he adopted the mode he employed as the most convenient in his view for both parties.

In reply to a letter of the plaintiff, Mr. F. F. Pole, agent of the defendants at Mitchell, wrote informing him that the charge of \$5.75 was a charge made by the shipper and paid by the Company to him: that he had no authority to deliver freight until all the charges were paid; and that he could not depart from the regular mode.

The plaintiff brought this action of detinue, and the defendants pleaded that the plaintiff purchased the goods in the City of London, and thereupon the plaintiff, for a reasonable reward in that behalf, employed and directed one C. Bennett in London aforesaid, a cabinet maker, &c., to find the materials for packing and to pack up for transportation from London to Mitchell the goods in the declaration mentioned, and directed Bennett to send them when packed to Mitchell: that thereupon Bennett did find said materials and labour and pack the said goods, and fit them for such transportation; and that the reasonable charges for his said work in packing and materials,

and all his services, amounted to \$5.75, and thereupon the said Bennett delivered the goods so packed to defendants, and directed them to transport the said goods to Mitchell, and there to deliver them to the plaintiff upon the payment of the said charge of \$5.75, and the charges of defendants for transportation, of all which the plaintiff had notice: that the defendants received the said goods, and, in the usual course of business, on the terms aforesaid, and transported the same to Mitchell; and upon the arrival of said goods at Mitchell the defendants gave the plaintiff notice that they were ready to deliver the goods to the plaintiff upon payment of their said freight and the said sum so charged by Bennett on the order of the plaintiff, and thereupon the plaintiff was willing to pay the said freight of the defendants, but refused to pay the sum so payable to Bennett as aforesaid, whereupon the defendants, acting for and upon the order of Bennett as aforesaid, refused to deliver the said goods until the sum payable to Bennett, and which he had directed the defendants to collect upon delivery of said goods, and for which Bennett had a lien upon said goods, was paid to the defendants, which the plaintiff refused to pay, or any amount in respect of the charges of said Bennett; and the defendants, acting upon the said instructions of Bennett and as his agents in collecting said charges, refused to deliver the said goods until the payment of said charges, which were just and reasonable, which are the causes of action, &c.

Issue.

The case came on for trial in the County Court on the 14th of December, 1870.

The evidence taken was to the effect above stated, and it shewed also that the charges made by Bennett were not exorbitant.

The learned Judge then charged the jury, that the defendants having received goods to carry from the consignor under certain conditions, the plaintiff had no right to them until the conditions were complied with; and that if they found for defendants he would reserve leave to the plaintiff to move in Term to enter verdict for him on any grounds.

A verdict was rendered accordingly for defendants.

In January Term, 1871, a rule *nisi* was taken out for the plaintiff, calling on defendants to shew cause why the verdict entered for the defendants should not be set aside and a verdict entered for the plaintiff, on the following grounds, pursuant to leave reserved at the trial, that is to say :

1. That Bennett had no lien upon the goods in question, as he was not a packer, nor was it shewn a packer would have a lien here by custom or otherwise.

2. That if Bennett by virtue of his occupation would have a lien on the goods so packed, the bargain and circumstances under which he packed these goods for the plaintiff was inconsistent with a lien.

3. That if defendants had a right of lien as Bennett's agents or servants, they waived it by holding the goods on a claim quite inconsistent with Bennett's lien.

4. That if Bennett ever had a lien, he relinquished it by parting with the possession of the goods, by consigning them to and at the risk and cost of the plaintiff.

5. That if defendants had paid as they alleged, they would have no lien.

6. That the consignor had no authority to pledge the goods to defendants for charges, and was only a particular agent, with no authority so to pledge them to defendants.

Or why a new trial should not be had, on the grounds of misdirection or non-direction of the learned Judge who tried the cause, in directing a verdict for the defendants instead of directing the jury to find a verdict for the plaintiff, on the grounds above set forth, or some of them, and failing to direct said jury on the several points contained in the grounds above set forth ; and on the grounds that the said verdict was against law and the weight of evidence ; or why a judgment *non obstante veredicto* should not be entered for the plaintiff, on the grounds that, although the pleas allege a lien, yet the facts set forth would not sustain the legal inference or effect of such a lien having existed.



Subsequently, after several enlargements and after argument, the learned Judge gave judgment in these words, endorsed on the rule *nisi*: "Rule to enter judgment for plaintiff.—D. H. LIZARS."

The rule absolute was drawn up to set aside the verdict for defendants, and enter a verdict for the plaintiff, pursuant to the leave reserved.

From this rule the defendants now appealed, on the following grounds:—

1. That the plea in this cause was proved at the trial, and found to be true by the jury who tried the cause, and said plea is good in law, or at all events is good after verdict.

2. That apart from the question whether or not Bennett was a packer, he had a lien upon the goods in question as having bestowed labour upon them after being delivered to him in the usual course of his business, and could and did authorize the defendants to collect the amount.

3. The cases in which the goods were packed were supplied by and were the property of Bennett, and as to them, at all events, he would have a lien, and could authorize defendants not to deliver the goods until this was paid.

4. That the defendants were bound not to deliver the goods until the terms imposed by the consignor were complied with, and they had nothing to do with the question in dispute between Bennett and plaintiff.

5. The plaintiff could not take the goods from Bennett unless he paid or tendered his charges for the work done in packing and the materials used, neither could he take from defendants, who held for Bennett, until these were paid.

During this Term the case was argued.

*M. C. Cameron*, Q. C., for the appellants, contended the plea was found to be true by the jury, and that the plaintiff should have replied a waiver by the defendants or by Bennett, if he contended the lien was given

up: *Savill v. Barchard*, 4 Esp. 53, shews packers have a lien. He referred also to C. S. C., ch. 59, sec. 3.

*Idlington*, contra. Bennett was not a packer. As to the lien of packers, see *Cross on Lien*, 352. His conduct was inconsistent with that of a person having a lien: *Crawshaw v. Homfray*, 4B. & Al. 50; *Cross on Lien*, 42, 43, 45. If a waiver of lien should have been replied, it may now be allowed to be added. Bennett lost his lien by delivery of the goods to defendants as carriers: *Sweet v. Pym*, 1 East 4; *Hussie v. Christie*, 9 East 426, 433. If Bennett had a lien, defendants may be right in their detainer of the goods, but not otherwise. If Bennett had no lien, the defendants cannot justify the detainer on his behalf: *Giles v. The Taff Vale Railway Company*, 2 E. & B. 822.

WILSON, J.—The charge of the learned Judge was, that the defendants having received goods to carry from the consignor under certain conditions, the plaintiff had no right to them until the conditions were complied with; and if the jury found for defendants, he would reserve leave to the plaintiff to move in Term to enter a verdict for him on any ground.

There is no note of any objection to the charge for misdirection or non-direction.

The judgment of the learned Judge in making the plaintiff's rule absolute is as follows: "Rule to enter judgment for plaintiff."

That is not a compliance with the statute, which requires, that the Judge shall certify his judgment or decision therein—that is, as I understand it, the grounds of his judgment or decision.

It is useless to certify in full motion papers, and enlarging rules from one term to another, as to which we care nothing, and to tell us no more of the important act of deliberation and consideration by the Judge than that it ended in a rule to enter judgment for plaintiff. The rule itself shews that. But the rule is not his judgment, nor is

it his decision. It is the result of it only. And it is his judgment or decision which the law requires he shall certify,

This is not the first time that appeals have come from County Courts in the like manner. The parties injured must take some means for redress, if their appeals are not received by the Superior Courts, in consequence of their being imperfect, by reason of the judgment or decision of the Judge of the County Court not being duly certified as part of the case.

In this particular cause, involving nothing more in reality than a charge of \$5.75, after a full trial, and a favourable charge for the defendants, the whole trial is undone, without one word of information or explanation from the Judge, more than the rule discloses, that it was done "pursuant to the leave reserved."

But turning to the leave reserved, we get no information there, for that merely says the plaintiff had leave reserved to him to move "on any ground."

Then the rule to shew cause sets out six grounds, on which, the plaintiff claimed to be entitled to the verdict on the leave reserved. But on which one or more of these six grounds the learned Judge thought the plaintiff entitled to have the verdict changed we have not the slightest information or idea.

In our opinion the plea was proved at the trial, and the verdict was rightly found for the defendants.

Whether the plea is a good defence in law is another question. With the goodness or badness of it the Judge and the jury had nothing to do at the trial. The question for them was, whether it was true or not true.

The *truth* of it was found for the defendants. We see no reason for questioning the finding upon that ground.

As we have said, we know of no misdirection or want of direction, for we see no such exception taken at the trial. We see that the rule to shew cause asserts, that the plaintiff's complaint in this particular is, that the Judge directed the jury to find a verdict for the defendants instead of for

the plaintiff on the six grounds set out in the rule, or on some of them, and failing to direct the jury on these several points.

The rule could not have been made absolute for the misdirection or non-direction, if there were any. There should, in that case, have been a new trial, unless indeed the parties consented that the Court in Term should decide on the whole case. But, in that event, the knowledge of what the Judge did becomes of value. His judgment or decision would explain all these proceedings to us, of which at present we have not the slightest conception.

We know of no other way to dispose of this case, than to consider the facts as having been settled satisfactorily by the finding of the jury, and to treat the reversal of the verdict and the transfer of it to the plaintiff, on the facts, as not warranted from the perusal of the pleadings and evidence, and to leave the only question to be considered as that which arises on the motion for judgment *non obstante veredicto*. By doing so, however, it is quite plain we are not disposing of the rule on the grounds on which the learned Judge disposed of it; for he directed the verdict to be entered for the plaintiff on the leave reserved, not *non obstante veredicto*.

The question then we take to be this: Bennett being a packer, and having furnished the boxes in which the plaintiff's goods were packed, and having a charge therefor of \$5.75, and having consigned them to the plaintiff by defendants' railway, and having directed the defendants to collect that charge, and not to give up the goods until the charge was paid—whether the defendants could detain these goods rightly until the charges were paid?

It may be conceded that the delivery of goods to a carrier on account of the consignee, to be carried at his risk and to be given up to him at the termination of the transit, is an abandonment of the lien by the consignor. That was the decision in *Sweet v. Pym*, 1 East 4.

It is just the same as to the price of goods between vendor and vendee.



The case of *McCombie v. Davies*, 7 East 5, determined that a broker, who had a lien on the goods of his principal, could not transfer his right of lien to another. Lord Ellenborough added, "that he would have it fully understood, that his observations were applied to a tortious transfer of the goods of the principal by the broker undertaking to *pledge* them as *his own*, and not to the case of one, who intending to give a security to another to the extent of his lien, delivers over the actual possession of goods on which he has that lien to that other, with notice of his lien, and appoints that other as his servant to keep possession of the goods for lien, in which case he might preserve the lien." See also *Man v. Shiffner*, 2 East 523.

In cases of *pledge*, the property need not necessarily remain with the pledgee, but may be left in the care and possession of the pledgor: *Reeves v. Capper*, 5 Bing. N. C. 136; *Martin v. Reed*, 11 C. B. N. S. 730; *Langton v. Warring*, 18 C. B. N. S. 315-324; *Donald v. Suckling*, L. R. 1 Q. B. 585.

This claim of Bennett's is undoubtedly not a pledge, it is a mere naked lien.

Yet his transfer of the goods to the defendants was not a tortious parting with or disposition of them. It was a delivery in the ordinary course of trade, and with the direction of the owner. The owner had no right to ask or expect that Bennett, who had a lien on the goods, or on the packing cases at any rate, should give up his lien by delivering them to the defendants. And Bennett had no intention of parting with his lien by such a delivery. He expressly guarded against it, by delivering the goods subject to his charge, and by directing the defendants to collect the charge for him, and that they could do only by the detainer complained of, that is, by exercising for Bennett the lien which Bennett still had, or which they themselves had by the course and usage of trade.

It would be impossible for commercial affairs to go on if each carrier, at the termination of his journey, were to detain the goods until the owner or consignee came per-

sonally to pay the freight and charges. Of necessity, the carrier who has finished his carriage of the goods transfers them to the carrier who next succeeds him in the transit, and he gets from the second carrier the amount of his charges. The second delivers them to the third carrier, in like manner, with the accumulated charge of the second journey; the third to the fourth, and so on to the final destination. And the consignee or owner pays to the last carrier the total charge upon delivery.

In this manner, none of the different carriers are kept out of their freight, and none are kept waiting until the consignee can send it to them; nor is the consignee kept waiting for his goods until he can send money, perhaps at great inconvenience, to the different intermediate changes of route to pay the charges; nor are the goods delayed, at the risk of fire or pillage, or the numerous causes of loss and damage to which they are always subject when they are warehoused.

We do not doubt that Bennett had a lien at the Common Law for the work he did. It is the general rule and principle, and the plea does not shew anything which constituted an abandonment of it.

It is a matter of surprise and regret that this plaintiff should have thought that an ordinary matter of business, a lien accompanying the goods, and to be paid by the consignee on delivery, was, as he called it, "a piece of unwarrantable impertinence." If a loss, in such a case and from such a cause, must fall upon any one, it can fall upon no one more deservedly than on this plaintiff.

The order of the Court will therefore be, that the appeal be allowed, with costs to be paid by the plaintiff, and that the learned Judge of the Court below do discharge both rules granted in the County Court interfering with the verdict found by the jury for the defendants; and that the verdict for the defendants shall stand.

MORRISON, J., concurred.

*Appeal allowed, with costs.*

## HERR V. WESTON AND CRONAN.

*Trespass to land—Justification under tenant in common—Estoppel by judgment in ejectment.*

To an action of trespass *quare clausum fregit*, alleging the land to be the plaintiff's, and that defendant ejected the plaintiff and took all the issues and profits, defendant justified under a demise from one M., who he alleged was seised in fee as a tenant in common of the land. The plaintiff excepted to the plea. *Held*, that the plea was good, as setting up title in a third party, for the plaintiff brought his action as owner of the whole, and not against defendant as co-tenant.

In trespass for mesne profits, &c., defendant justified under a demise from a tenant in common for one year from May, 1871. The plaintiff replied estoppel by a judgment in ejectment, recovered in 1870, against a tenant of defendants then in possession, of which suit defendants had notice. On demurrer to the replication, on the ground of want of privity between the tenant in common and the defendant in ejectment, and because it did not appear that the title under which the plaintiff recovered in ejectment continued up to the demise to defendant: *Held*, that the replication was good, the presumption being that the title continued until the contrary was shewn.

## DEMURRER.

Declaration: first count, in trespass for mesne profits, and charging that defendants ejected the plaintiff and kept him ejected, and took the rents, issues, and profits, &c.

Second count, trespass *quare clausum fregit*, and that defendants ejected, &c., and depastured the grass, &c., and destroyed gates, fences, &c.

Third plea. That before the alleged trespass Michael Murphy being seised in fee as a tenant in common of the said land, demised the same to the defendant Weston for the term of one year from the 1st of May, 1871, by virtue of which demise defendant Weston entered upon the said lands and became possessed thereof for the term aforesaid, whereupon the defendant Weston during the said term in his own right, and the defendant Patrick Cronan as his servant and by his command, committed the alleged trespass.

Fourth plea. That before the alleged trespasses, Michael Murphy, being seised in fee as a tenant in common of the said lands, constituted the defendant Weston his attorney, amongst other powers thereby given, to take possession of and improve the said lands, and to appoint any servants or agents to assist him, by virtue of which letters of attorney



defendant Weston entered upon the lands and became possessed thereof for and on behalf of the said Murphy, and with the defendant Cronan as his servant, while acting under the authority of the said letters of attorney, committed the alleged trespass.

Second replication, to so much of third plea as relates to the trespasses complained of in the declaration between the 17th August, 1870, and the commencement of this suit : That the defendants ought not to be admitted to plead the third plea as to the said trespasses, because, on the day and year last aforesaid, the plaintiff for the purpose of recovering possession of the said land, &c., sued out a writ of ejectment directed to Thomas Gardner by name, being the person then in possession as tenant thereof, &c. : that Gardner was served with a copy of the writ, &c. : that he entered an appearance to the writ, and defended the same, and his alleged title to the lands, &c., as the tenant of the defendants. Averment, that he was tenant, &c., under a lease thereof from the defendants to him bearing date prior to the teste and service of the writ ; that immediately after being served with said writ, and before he entered an appearance, he notified the defendants of the service on him, and of the plaintiff's title to the said land ; that defendants were present at the trial, &c., of the suit, and aided and assisted Gardner in his defence. Averment of the recovery of a judgment, &c., and that by virtue of the judgment the plaintiff entered into possession, &c.,—wherefore the plaintiff prays judgment if the defendants ought to be admitted to plead the third plea as to the trespass, &c., since the 17th August, 1870.

A similar replication was pleaded by way of estoppel to the fourth plea.

*Demurrer* to the replication to third plea, on the grounds :

That the facts as alleged are not sufficient to estop the defendants: that the third plea alleges the title to the lands to be in Murphy as a tenant in common of the fee before the alleged trespasses, &c. : the tenants justify under him, while the replication of estoppel by the judgment in eject-



ment shews no privity between either the defendants or Thomas Gardner and Murphy, and is no answer to the plea : that the replication is bad for uncertainty, and pleads estoppel as to trespasses between the 17th August, 1870, and the commencement of this suit, and for all that appears the suit may have commenced either before or after the commencement of the term mentioned in the third plea to which it is pleaded, and if after, is no answer to the trespasses committed between 1st May, 1871, and commencement of this suit.

*Demurrer* to the replication to the fourth plea, on similar grounds.

Joinder in demurrer.

The plaintiff gave notice of the following exceptions to the third and fourth pleas :

1st. That the third plea professes to answer the whole declaration, but only answers the trespasses committed since 1st May, 1871.

2nd. That the plea is no answer in law to the first count, as a plea of tenancy in common is no answer to a count for mesne profits.

3rd. That the plea is no answer to the first count, because said count charges the defendants with having ejected the plaintiff from said close and kept him ejected, and with having received all the issues and profits of said close, and neither one tenant in common nor any one claiming under him has power or right to eject from and to receive to his own use all the issues and profits of the common property.

4th. That said plea is no answer to the second count, which charges a breaking and entry, and also an ejecting and an expulsion of the plaintiff, and with cutting down, removing, and destroying the trees, crops, grass, underwood, and fences of the said close, because a tenant in common has no right nor authority to do so, nor can he license or authorize any one else to do so.

5th. That a tenant in common and those claiming under him cannot, under a plea of tenancy in common, justify an expulsion or an ouster from, or the removal or destruction

of, the common property, all of which are charged and complained of in the said declaration.

The exceptions to the fourth, plea were similar to the 2nd, 3rd, 4th, 5th, and 6th exceptions taken to the third plea.

The case was argued during Michaelmas Term last.

*C. S. Patterson*, for the demurrer, cited *Doe v. Harlow*, 12 A. & E. 40.

*S. Richards*, Q. C., contra, cited *Doe v. Harvey*, 8 Bing. 239; *Yellowly v. Gower*, 11 Ex. 285; *Jacobs v. Seward*, L. R. 4 C. P. 328; S. C. 22 L. T. N. S. 690; *Wilkinson v. Kirby*, 15 C. B. 430; *Stedman v. Smith*, 8 E. & B. 1.

MORRISON, J.—We see nothing in the exceptions taken to the third and fourth pleas. The declaration shews the action is brought by the plaintiff, as owner of the whole, and not against the defendants or either of them as cotenants, and the defence set up by the pleas is, in fact, title in another party, under which the defendant Weston entered, &c. The form of the pleas is according to the precedent given in *Bullen & Leake*. If Murphy had no title to the lands, issue might be taken on that fact, or if the trespasses the plaintiff is suing for are trespasses not covered by the pleas, the plaintiff should so reply,

Then, as to the demurrer to the replications by way of estoppel to the third and fourth pleas, we see no objections to these replications. They also follow the precedents in *Bullen & Leake*.

But it was contended, that as the plea avers that defendant Weston obtained a lease from Murphy on the 1st May, 1871, under which the defendants entered, &c., and as the replications shews that the judgment in ejectment, upon which the plaintiff relies, was one recovered on the 17th August, 1870, against one Gardner, the tenant then in possession under defendants: that no privity is shewn between the plaintiff and Murphy, and for all that appears the plaintiff's title, under which he then recovered, may have expired before the 1st May, 1871, and that for these reasons

the replications are bad. We do not think so. All that is necessary to be shewn in the replication is, that Gardner at the time of the service of the writ of ejectment was in possession as a tenant of the defendants, and that they, the defendants, were notified, &c., of the action so brought against these tenants to recover possession of the premises. Now these facts do appear, and the authorities shew that in such a case the recovery was as much against the defendants as their tenant Gardner, and they are estopped from denying the recovery in ejectment. Whatever may have been the title under which the plaintiff then recovered, it is admitted by the demurrer, and the presumption of law is, that the title is continuing until the contrary is made to appear: *Wilkinson v. Kirby*, 15 C. B. 430.

In that case the subject is fully discussed, and as said by Jervis. C. J., "If indeed there be circumstances to prevent the judgment from operating as an estoppel since that period, \* \* \* those circumstances might be replied; but the defendant cannot be allowed to admit the judgment, which is conclusive between the parties, and deny the continuance of the plaintiff's title. And, as the Chief Justice says in that case, "The plaintiff complains of a trespass, the defendant says, 'You were not possessed of the premises upon which the alleged trespass was committed; for somebody else had title:' to which the plaintiff answers, 'You are not at liberty to deny my title, or to set up the title of a third person, because there has been a judgment in a proceeding between us which has determined the title to be in me, and under which I have entered.' If any circumstances have occurred since that recovery to alter the position of things, the defendant should have shewn that by way of rejoinder."

On the whole, we are of opinion, that the plaintiff is entitled to our judgment on the demurrers to the replications, and the defendant to judgment upon the exceptions taken to the pleas.

WILSON, J., concurred.

*Judgment accordingly.*



## MCGIVERIN ET AL. V. TURNBULL.

*Action on covenant—Pleading—Accord and satisfaction by parol.—Misjoinder.*

The plaintiffs sold to defendant by deed the right to manufacture and sell their patent right, for "Kinney's Metallic Waggon Seat," for the time in the patent mentioned. Defendant covenanted to manufacture at least twenty per day, and as many more as the demand should require, paying each of the plaintiffs one half of a royalty of 25c. on each seat, and further, to supply McK. & Co. with at least 200 seats per month at 95c. each, pursuant to an agreement between them and the plaintiffs, paying on these a royalty of 20c. to the plaintiffs. There were other covenants by defendant to manufacture in a workmanlike manner, &c., and to make use of all means to introduce the seats and make them known. The declaration set out the deed and assigned breaches of all the covenants.

The third plea was, that, after breach, it was agreed between the plaintiffs and defendant that they should release each other from the performance of their respective covenants, and all rights of action in respect thereof, and in consideration thereof defendant agreed to manufacture thenceforth only so many seats as would supply the demand, and the plaintiffs accepted such agreement in satisfaction of the cause of action declared on. *Held*, bad, as being pleaded to the whole cause of action, whereas it could only be an answer to the breaches of the covenant and not to the covenant itself, for it shewed no release, but only an agreement for one, and no satisfaction by deed; and because the satisfaction was insufficient, the new agreement being merely to manufacture a less number of the same article in the same way, and on the same terms.

The fourth plea, on equitable grounds, alleged that, in consideration that defendant would release the plaintiffs from performance of said covenants on their part, and from all causes of action in respect thereof, the plaintiffs agreed to release defendant from performance of said covenants on his part; and that defendant accordingly did release the plaintiffs from the performance of said covenants on their part. *Held*, bad, for not averring a release of the plaintiff from all causes of action; and because such a verbal concord under these circumstances could be no defence, in equity, unless the plaintiffs accepted the release or by their conduct and acquiescence led defendant to believe the first agreement at an end.

The thirteenth plea, averring that the second agreement was made in consideration that the defendant would not avail himself of a right he possessed under the first deed to put an end to it by giving a sixty days' notice to plaintiffs: *Held*, a good plea on equitable grounds.

The declaration was *held* bad, for a misjoinder of causes of action, being for royalties payable severally to the plaintiffs, and also for other royalties payable to them jointly.

## DEMURRER.

*Declaration.*—That by deed of 8th of October, 1868, between the parties, it was recited that the plaintiffs were the owners of a patented invention, known as "Kinney's



metallic waggon seat," and that they had thereby sold to defendant the right to manufacture and sell the same, for such time as was in the patent mentioned. And the defendant covenanted with the plaintiff during the time in the deed specified to manufacture at least twenty of such seats each working day, and as many more as might be necessary to supply the demand; and further, that he would cause every seat to be painted with one good coat of paint before being offered for sale; and that he would use all reasonable efforts to introduce the seat and to make it generally known; and would keep a true account with each of the plaintiffs, and pay the plaintiffs a royalty of 25c for each seat so made without a moulding, and 30c for each seat made with a moulding, and pay one-half of such royalties to each one of the plaintiffs; and furnish to R. McKinlay & Co., of St. Catharines, 200 seats per month, pursuant to an agreement before then made between them and the plaintiffs, for an average price of 95c each; and pay the plaintiffs a royalty of 20c on each of such seats, provided McKinlay & Co., should elect to purchase at the rate of 200 per month, but if they should not purchase at such rate of 200 per month, defendant to sell them what they should purchase at the same terms as to other purchasers; and pay the plaintiffs for each seat which McKinlay & Co. should purchase from defendant not at the rate of 200 per month, the same royalty firstly above mentioned in respect to similar seats to be sold by defendant to others.

The plaintiffs averred that defendant manufactured seats and sold them to McKinlay & Co., Davidson & Son, and divers others: that defendant could have sold to these persons and to others much more than twenty seats each working day, and also many more than 200 per month to McKinlay & Co., if defendant had manufactured, as he covenanted to do, enough to supply the demand, and had painted the same before offering the same for sale, and had used all reasonable efforts to introduce the seat and make it generally known. The plaintiffs further averred that

McKinlay & Co. never purchased from defendant at the rate of 200 seats per month. There was also an averment of general performance by plaintiffs.

The declaration then alleged that defendant had failed to perform his covenant, in this :

1. He had not manufactured at least twenty seats each working day, but less, and those manufactured were manufactured in a bad and unworkmanlike manner.

2. He had not manufactured as many as were necessary to supply the demand.

3. He did not cause every seat to be painted with one coat of good paint before offering it for sale.

4. He did not use all reasonable efforts to introduce the seat and make it generally known, but omitted to do so, and agreed with Davidson & Son, of Toronto, to give them a monopoly of all sales of such seats in Toronto ; and that defendant, thereupon, refused to make the seat known and to sell it to Wm. Brown, of Toronto, and others, who wished and demanded of defendant to introduce and make it known to them and to allow them to purchase large numbers of such seats.

5. He did not keep a true account with each of the plaintiffs of all seats manufactured by him.

6. He did not pay to the plaintiffs a royalty of 25c for each seat made without a moulding, and 30c for each seat with a moulding.

7. He did not pay one-half of such royalty to each one of the plaintiffs.

8. He did not pay the plaintiffs for each seat sold by him to McKinlay & Co. the same royalty firstly above mentioned in respect to similar seats sold by defendant to others.

By reason whereof, &c.

The pleas, so far as necessary to be set out, were as follows:

Third plea : That after breach by defendant of the said covenants, and before the commencement of this suit, it was agreed by and between the plaintiffs and defendant, that they should release each other from the performance of the said covenants on their respective parts to be performed,

and from all causes and rights of action in respect thereof, and that the defendant should enter into such an agreement as is hereinafter mentioned ; and thereupon, and in consideration thereof, the defendant agreed with the plaintiffs that he would thenceforth manufacture on the terms in the declaration mentioned so many only of the said seats as should from time to time be necessary to supply the demand for the same ; and the plaintiffs accepted the said agreement of the defendant in full satisfaction and discharge of the causes and rights of action in the declaration mentioned.

Fourth plea, upon equitable grounds : That after the making of the said deed, &c., in consideration that the defendant would release the plaintiffs from the performance of the said covenants on their part, and from all causes and rights of action in respect thereof, the plaintiffs agreed to release the defendant from the performance of the said covenants, &c., on defendant's part, and the defendant accordingly did release the plaintiffs from the performance of the said covenants on their part to be performed.

Twelfth plea, upon equitable grounds, to the eighth breach : that McK. & Co. did not perform their agreement nor take said seats from the defendant at the rate of 200 per month, as the plaintiffs well knew : and that in consideration that the defendant would go on and supply to the said R. McK. & Co. so many of the said seats as they might require, although under 200 per month, at the same price as if they had taken 200 per month, the plaintiffs agreed with the defendant that they would only exact from him the royalty in the declaration mentioned in respect to the said agreement of R. McK. & Co. when said seats were furnished to them at the rate of 200 per month, and the plaintiffs exonerated and discharged the defendant from obligation to pay an increased royalty because said R. McK. & Co. did not take 200 seats per month. And the defendant further says that he did pay to the plaintiffs for each seat sold to R. McK. & Co., as aforesaid, the royalty required to be paid when said seats were supplied at the rate of 200 per month.



Thirteenth plea, to the whole declaration, upon equitable grounds : that the said deed was subject to a condition therein expressed and contained, giving the right to the plaintiffs or the defendant of terminating the said deed by giving to the opposite party or parties, as the case might be, sixty days notice in writing of such intention, and providing that at the expiration of sixty days from the day of the giving of such notice the said deed should forthwith cease and be at an end : that one of the inducements for defendant entering into the agreement to manufacture 20 seats per day was the fact that he was informed by the plaintiffs of the agreement of R. McK. & Co. in the deed mentioned to take 200 seats per month, and the defendant believed from the statement of the plaintiffs that they would do so, but the said R. McK. & Co. never fulfilled their agreement, and never, except on one occasion, took 200 seats per month ; and shortly after making the deed it was ascertained by the parties to it that the number of seat backs which defendant had agreed to make could not be sold because there was not a sufficient demand for them, although the defendant did everything in his power to introduce the seat and make it generally known, travelling and advertising the seat back in various other ways. And further, that the plaintiffs well knew the defendant was not making the number of seat backs per day required by the deed, and the plaintiffs acquiesced therein, and made no objection. And the defendant further says he informed the plaintiffs that unless the said deed was abandoned he would put an end to it, by giving to the plaintiffs the sixty days notice in this plea mentioned, and thereupon the plaintiffs, with full knowledge and notice of the premises, in consideration that the defendant would refrain from giving such notice, agreed with the defendant that the arrangement under the deed as to the number of seats to be furnished should be rescinded, and defendant released from all liability which he might theretofore have incurred, and that defendant should go on and make only as many seats per day as would supply



the demand, to which last mentioned agreement the defendant consented, and upon the faith thereof refrained from giving the plaintiffs notice putting an end to the said deed, and thenceforth went on with the manufacture of the said seats, with the consent of the plaintiffs, under the new arrangement, and furnished accounts to them from time to time which shewed that he was not making twenty seats per day, but less, to which the plaintiffs never objected, but settled with the defendant from time to time upon the footing of the said accounts. And the defendant alleges that by the acts and conduct and acquiescence of the plaintiffs as aforesaid the deed declared upon has been released, and the plaintiffs are estopped and precluded from maintaining this suit; and the defendant avers that he has in all respects performed the new agreement.

The third plea was demurred to, on the grounds—  
1. That it was an attempt to vary a contract under seal, and bar the breaches of it by a verbal agreement without consideration. 2. That it confessed without avoiding the causes of action. 3. A verbal release such as the plea sets up is inoperative against a contract and covenants under seal.

The grounds of demurrer to the fourth plea were the same as those to the third plea, and that it disclosed no equity, and was uncertain and vague.

The grounds of demurrer to the twelfth plea were—  
1. That it confessed the eighth breach without avoiding it. 2. That it was an attempt to get rid of a contract under seal, and bar the breaches of it by a verbal agreement without consideration.

The causes assigned of demurrer to the thirteenth plea were the same as to the third and fourth, and that it was a confession without avoidance, legal or equitable, of the defendant's contract, or, if there was any avoidance, it only related to the manufacture of less than twenty seats per day, and so would only operate to reform the contract in that particular, leaving the rest of the breaches undefended; and because the plea was confused and contradictory.

*Richard Martin*, for the demurrer, cited *McPherson v. Dickson*, 8 U. C. R. 29; *Cumber v. Wane*, 1 Str. 426; *Edwards v. Baugh*, 11 M. & W. 641, 646; *Eastwood v. Kenyon*, 11 A. & E. 438; *Gaskin v. Counter*, 6 C. P. 99; *Scott v. Niagara District Mutual Fire Insurance Co.*, 25 U. C. R. 119; *The Mayor, Aldermen, &c. of Berwick on Tweed v. Oswald*, 1 E. & B. 295, 309; *Wilkinson v. Byers*, 1 A. & E. 106; *Dixon v. Adams*, Cro. Eliz. 538; *Smith v. Trowsdale*, 3 E. & B. 83.

*Craigie*, contra, cited *Hall v. Flockton*, 16 Q. B. 1039; *Davis v. Nisbit*, 10 C. B. N. S. 752; *De Pothonier v. De Mattos*, E. B. & E. 461.

WILSON, J.—By the third plea the defendant, for the purpose of testing its sufficiency in law, admits that he broke all the covenants in the declaration as complained of. And he says he should not now be sued for such breaches of his covenant, because he and the plaintiff agreed that they should release each other from the performance of the covenants on their respective parts to be performed, and all causes and rights of action in respect thereof, and that the defendant should enter into the new agreement before mentioned.

The covenant was either a continuing one, for breach of which an action would lie from time to time, or it was a covenant which was broken once for all, and for which a single recovery in damages would be an entire satisfaction.

In this case it does not appear by the declaration how long the covenant was to continue. "During the term in and by the letters patent provided" is all that is alleged. How long a time that was is not stated, nor can it be inferred, as the date of the patent is not given. Nor is it stated how long McKinlay & Co. were to be furnished with seats.

The covenant does not appear, however, to be one which has expired, nor is it pleaded to as such. On the contrary, it is pleaded to as a subsisting continuing covenant, for the performance of acts the time for the completion of which

has not yet arrived. If that be so, and it is the meaning which I place on the declaration and plea, the plea must be a bad plea, because it is not only pleaded to the causes and rights of action in respect of the covenant—that is, as to those breaches which have already happened—but it is pleaded to “the performance of the covenants,” that is, to the covenants which have not been broken, or to the further continuance of the covenants between the parties as to future rights or causes of action; and this plea does not shew a release in fact, but merely an accord for a release; and it shews no satisfaction by deed applicable to the subsisting covenant.

After breach of covenant an accord and satisfaction not by deed is a good defence, because it is pleadable and should be and can only be pleaded to the breach of the covenant, and not to the deed or covenant itself. The covenant or deed is to some extent gone, and the remedy subsists upon it, but in lieu of it, by way of damages for the breach. To these damages and breach the accord and satisfaction not by deed may be pleaded.

The alleged satisfaction of this plea, being based on an accord which is invalid in law, cannot be sustained.

But the satisfaction is also insufficient, because it appears there was an agreement for a release, and the satisfaction does not allege that the agreement as to the release was accepted by the plaintiffs, but that the new and substituted agreement about the seats should be taken in satisfaction, and no release is shewn, so the satisfaction and concord do not agree.

Then, again, the new agreement is, that the defendant “would thenceforth manufacture on the terms in the declaration mentioned, so many only of the said seats as should from time to time be necessary to supply the demand.”

The covenant bound the defendant to manufacture “at least twenty seats each working day, and as many more as might be necessary to supply the demand.”

The new agreement is less onerous to the defendant, and is no gain or service to the plaintiff.

It is not for the performance of a different work, or in a different time, but it is an agreement to take a smaller performance of the same work and on the same terms, in all respects, as the larger work was to have been done, in lieu of the larger work.

There is no case which shews this to be a good plea of accord and satisfaction.

If the defendant were bound to deliver 1000 saw logs at so much a piece and at such a time and place, a plea that it was agreed after breach that the defendant should deliver 500 logs at the like price, time and place, would not without more be a good plea. And so it would be the same of any other chattel or any sum of money.

But anything different in kind, or in time of delivery or otherwise, will be a good defence. A negotiable note for a smaller sum will be a satisfaction of a larger sum for which no note is held. So if A. and B. promise to pay a smaller sum in lieu of a larger sum which B only owes. So payment at an earlier day of a smaller sum will be a satisfaction of a larger sum. So the delivery of a chattel in lieu of a debt, or one chattel in lieu of another, or payment of money in lieu of a chattel. So the delivery of the chattel agreed to be delivered, if delivered at a different place from that originally agreed upon, or at a different time. And many other cases of the like kind are all good pleas, without respect to the value of the substituted sum or article. That is a matter for the parties themselves.

But in the nature of things it is said one dollar paid, without any other circumstance than an agreement to take it, in lieu of five dollars, shews no sufficient consideration to support an agreement; and that is in effect the nature of this third plea.

I think that the fourth plea is bad, because it does not aver a performance of the satisfaction according to the accord. It does not shew that the defendant released the plaintiff from all causes and rights of action in respect thereof.

I think such a verbal concord can be no defence in equity, unless it appears that the plaintiffs accepted the



release from defendant, or unless such forbearance, acquiescence or dealing is shewn on the part of the plaintiffs toward the defendant, that it is manifest that the defendant believed and had reason to believe the contract was entirely ended, although the plaintiff did not in form release the defendant.

An equitable plea, that the plaintiff after the causes of action for good and sufficient consideration released defendant, without deed, is a good defence, but that is not this plea: *De Pothonier v. De Mattos*, E. B. & E. 461 cited by Mr. *Craigie*.

The twelfth plea is bad for the reasons already referred to in disposing of the third plea.

The thirteenth plea is, I think, good as an equitable plea. The defendant had the right to put an end to the whole arrangement by giving a notice of his intention to terminate it in sixty days after such notice. The plaintiffs requested him not to do so, and they agreed with him in the manner the plea sets out, on the faith and agreement that the defendant would not terminate the contract. That is such a defence as must be available to the defendant as an equitable plea.

The declaration shews the defendant was to keep a true account with each of the plaintiffs of all metallic seats he manufactured.....and to pay one half of the 25c and 30c royalties to each one of the plaintiffs. And the fifth breach is, that the defendant did not keep a true account with each of the plaintiffs, and the seventh breach is, that the defendant did not pay one half of such royalties to each one of the plaintiffs.

The royalty to be paid by defendant for the seats he sold to McKinlay, & Co., were to be paid to the plaintiffs, not to each of them.

The question is, can this declaration be supported? Is there not a misjoinder of causes of action?

The declaration states that the covenant to do these acts was made with the plaintiffs.

It appears to me, that with respect to these two matters

the interest of the plaintiffs is altogether several, and that they should have sued separately for the breach of them.

The fact that some of the covenants are joint will not prevent others from being several, if they should be properly so construed : *Beer v. Beer*, 12 C. B. 60, per Maule, J. p. 79.

As to joint and several rights of action, see *Sorsbie v. Park*, 12 M. & W. 146 ; *Foley v. Addenbrooke*, 4 Q. B. 197 ; *Haddon v. Ayres*, 1 E. & E. 118 ; *Pugh v. Stringfield*, 3 C. B. N. S. 2 ; *Keightly v. Watson*, 3 Ex. 716.

I think the third, fourth, and twelfth pleas are bad ; the thirteenth plea is good ; but that judgment on the whole record must be given against the declaration, for the misjoinder before mentioned.

The plaintiffs however may have leave to amend within a month on payment of the general costs of the demurrer, less the demurrers to the pleas on which the plaintiffs have succeeded, and which may be set off.

MORRISON, J., concurred.

*Judgment accordingly.*

MEMORANDA.

During this term the following gentlemen were called to the Bar:—

The HONORABLE JOHN HAMILTON GRAY, ROBERT WARDROP, CHARLES RANN WILKES, ALFRED FROST, ARTHUR WELLINGTON FRANCIS, WALTER GIBSON PRINGLE CASSELS, CHARLES COVERNTON BACKHOUSE, WILLIAM ALEXANDER HAMILTON DUFF, WILLIAM MACDONALD, DAVIDSON BLACK.

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In the vacation succeeding this term DANIEL MCMICHAEL, WILLIAM PROUDFOOT, CHRISTOPHER SALMON PATTERSON, EDMUND BURKE WOOD, JOHN ANDERSON, SAMUEL HUME BLAKE, and THOMAS MOSS, were appointed Her Majesty's Counsel, by his Excellency the Lieutenant Governor of Ontario.

EASTER TERM, 35 VICTORIA, 1872.

(*From May 20th to June 8th.*)

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*Present :*

THE HON. JOSEPH CURRAN MORRISON, J.

“ ADAM WILSON, J. (*a*)

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TUNIS AND BAMBERGER ET UX. V. PASSMORE.

*Will—Construction—Rule in Shelley's case—Estate for life or in tail.*

H. devised lands “in trust for the only benefit of R. B., for and during his natural life, without impeachment of waste, and from and after the determination of that estate, in trust for the heirs of the body of him, the said R. B., and in default of such issue, then in trust for the next heirs of me, the said H.”

*Held*, clearly within the rule in Shelley's case, and that R. B. took an estate tail.

EJECTMENT for parts of lots 13 and 15 in the fourth concession of Barton, containing 17 acres, 2 roods, and 20 perches.

The plaintiffs claimed title as heirs-at-law and devisees under the will of Peter Hess, who was entitled thereto by possessory title.

It was not said how the defendant defended, otherwise than by his appearance. At the trial he proved a title to himself from Robert Bostwick.

The cause was tried at the last Spring Assizes at Hamilton, before Stephen Richards, Q. C., sitting for the Chief Justice without a jury. It was admitted that Peter Hess died seised in fee of the land in 1857, having duly made his will, dated the 30th of July, 1855, sufficient to pass real estate.

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(*a*) The Chief Justice was absent on leave during this term, owing to illness.



The will was put in. The part of it which was relied on was as follows: "And I give and devise unto my executors hereinafter named, and their heirs, the following hereditaments and premises" (describing the land in question and other lands), "in trust as to those several parcels of land and premises situated in Barton aforesaid, for the only benefit of my grandson Robert Bostwick for and during the term of his natural life, without impeachment of waste, and, from and after the determination of that estate, in trust for the heirs of the body of him, the said Robert Bostwick, and, in default of such issue, in trust for the next heirs of me, Peter Hess."

Robert Bostwick conveyed, by deed of the 10th of November, 1860, the land in question to Samuel McDonell, his heirs and assigns, to the use of the grantor, his heirs and assigns, for ever. That deed was called a discharging deed.

Afterwards Bostwick conveyed his interest in the land in question to the defendant. Bostwick died in 1867, under 30 years of age, unmarried and without issue. The wives of Tunis and Bamberger were the co-heiresses of Peter Hess.

A verdict was entered for the plaintiffs; with leave to the defendant to move to enter the verdict for him, if the Court should be of opinion he was entitled to succeed.

In this Term *Sadleir* obtained a rule accordingly.

The rule was argued before WILSON, J. alone.

*Spencer* shewed cause. The question is, whether Robert Bostwick, by the will of Peter Hess, took a life estate or an estate in tail. If the former, the plaintiffs retain the verdict; if the latter, the defendant must succeed. The answer is to be gathered from the will, What was the intent of the testator? He gave Bostwick expressly an estate for his natural life, "and after the determination of that estate" (not after or on his death), then to the heirs of his body. Bostwick's own estate is to cease before the estate of his heirs can begin; and in that respect the

present case differs from many of the cases on the subject : *Crabb* on R. P., secs. 987–988–991 ; *Doe dem. Atkinson v. Featherstone*, 1 B. & Ad. 944 ; *Lowe v. Davies*, 2 Ld. Raym. 1561 ; *Goodtitle d. Sweet v. Herring*, 1 East 264 ; *Doe d. Cooper v. Collis*, 4 T. R. 294. The words, “after the determination of that estate,” do not more indicate an intention to limit the estate of Robert Bostwick to his own life than the word “only” in the case of *Backhouse v. Wells*, 10 Mod. 181, which word was held to restrict the devise in that case, similar in effect to the devise in this case, in favour of the devisee to his own life only.

*Sadleir* supported the rule. The devise to Bostwick gave him an estate tail and the legal interest : 2 *Jarman* on Wills, 299 ; *Preston* on Estates, 266 ; *Doe d. Terry v. Collier*, 11 East 377. The words “without impeachment of waste” make no alteration in the effect of the devise ; *Coulson v. Coulson*, Str. 1124–1125 ; *Preston* on Estates, 366. The rule in *Shelley’s* case is strictly applicable here.

WILSON, J.—The case referred to of *Doe dem. Terry v. Collier*, 11 East 377, shews that Robert Bostwick took a legal estate, and took in tail.

The rule is, “that whenever there is a limitation to trustees, although with words of inheritance, the trustees are to take only so much of the legal estate as the purposes of the trust require.” If the trustees have to pay the rents over, they take the legal estate, because they must receive the rents before they can pay them over ; but, if they are to permit the *cestui que trust* to take the rents, he can do that without their intervention, and he takes the legal estate : *Barker v. Greenwood*, 4 M. & W. 421 ; *Williams v. Waters*, 14 M. & W. 166.

The case of *Doe dem. Terry v. Collier*, 11 East 377, was a devise in trust (among others) for the testator’s nephews during their lives and the life of the longest liver of them, without impeachment of waste, “and from and after the

determination of that estate," over; but no question was made on the use of these words.

The case cited of *Backhouse v. Wells*, 10 Mod. 181, is quite opposed to *Hodgson v. Merest*, 9 Price 556, and also to *Roe d. Dodson v. Grew*, 2 Wils. 322.

It is quite plain here that the devise to Robert Bostwick is within the rule in Shelley's case. He is, by the express terms of the will, to hold for his own life, and, by the will, the estate conferred is not to determine so long as there are heirs of his body—that is, it is not to go over to the next heirs of the devisor until the heirs of the body of Robert Bostwick have entirely failed.

That is an estate in tail. by the concurrent opinion of every decision, on such language as is to be found in this will: *Roe d. Dodson v. Grew*, 2 Wils. 322.

Whenever "an estate of freehold is limited to a person, and the same instrument contains a limitation, either mediate or immediate, to his heirs or to the heirs of his body, the word *heirs* is a word of limitation, and the ancestor takes the whole estate comprised in this term. Thus, if the limitation be to the heirs of his body, he takes a fee tail; if to his heirs general, a fee simple." So it is stated in 2 *Jarman* on Wills, 3rd Ed. 306, and by all other writers. It is in fact a rule of law, and not a rule of construction.

There is no difference between the expressions, "on the determination of the life estate," or, "of that estate," and "on the determination of the life," or, "on the death of the tenant for life," that I can understand. In every such case there is the limitation of the freehold and the limitation to the heirs, or heirs of the body, in the same instrument, to the same person, and that is all that is necessary to constitute the one enlarged estate, by reason of the two limitations.

The words, "without impeachment of waste" make no difference.

"In many cases," it is said in 2 *Jarman* on Wills, 3rd Ed. 307, "a devise to a person for his life, and after his death to the heirs of his body, has been held, by force of the

context, to give an estate for life only to the ancestor; but this has been the result, not of holding the heirs of the body as such to take by purchase, but of construing those words to designate *some other class of persons*, generally less extensive. The rule therefore was excluded, not violated, by this interpretation."

There is nothing in this will to alter or affect the general language and interpretation, and it is needless to refer to cases which do not properly apply to it.

The rule will be absolute to enter the verdict for the defendant.

*Rule absolute.*

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### HERR V. TOMS.

#### *Attorney—Action for negligence.*

Where an attorney, being employed to get a judgment of *non pros.* signed against the plaintiff set aside, applied through his town agent for an order for that purpose, which was granted on the 16th June, but the agent neglected to take out the order until the 22nd October following, in consequence of which delay the order was set aside and the judgment allowed to stand:

*Held*, that this was negligence for which the attorney was responsible, and that it was no defence that he acted under the advice of counsel.

*Held*, also, that the evidence of defendant's retainer, set out below, was clearly sufficient.

ACTION against an attorney for negligence in the conduct of a suit.

The first count of the declaration set out, that on the 26th March, 1866, judgment of *non pros.* was signed against the plaintiff in an action of ejectment, and execution thereon was issued against the plaintiff, and that, in consideration that the plaintiff retained the defendant to apply for and obtain a rule or order setting aside the said judgment, the defendant accepted such retainer, &c.; but that defendant did not use due and proper care and skill, &c., in applying for and obtaining the said rule or order, whereby the plaintiff was obliged to suffer the judg-



ment of *non pros.* and the execution, &c., to remain in full force against him, and lost the costs and expenses incurred in prosecuting the action of ejectment, and the costs of the application for the rule or order, and was obliged to pay the costs incurred by the defendant in the ejectment and in the application for the rule, &c.

Second count, a similar one, charging that the defendant conducted the application negligently and unskilfully.

Pleas. 1. Denial of retainer. 2. To the first count, that defendant used proper care, skill, &c.; 3. To the second count: that defendant did not conduct the application negligently, &c.

The trial took place before Galt, J., at the last Goderich Assizes. By consent it was agreed to admit as evidence of for the purposes of the trial all the facts set forth in the report of the case of *Herr v. Douglass*, 4 P. R. 102.

The evidence at the trial on the part of the plaintiff shewed that a Mr. Davidson, an attorney, was first retained by the plaintiff to bring the action of ejectment on the 23rd September, 1865: that judgment of *non pros.* was signed in the cause on the 26th March, 1866: that the plaintiff informed Davidson that an execution had issued for the costs, and that while Davidson was examining the proceedings to move to set the *non pros.* aside, he was called away on militia duty: that he went to defendant's office and requested defendant's then partner, Mr. Moore, (since deceased) to attend to the matter, telling him where the plaintiff resided. Nothing was said as to the terms on which they were to act, but Moore said they would employ their own Toronto agent; and afterwards Moore informed Davidson that they had been retained by the plaintiff the day after he, Davidson, left, and that they had got their costs from the plaintiff.

The plaintiff also testified that he employed Messrs. Toms & Moore, and that he paid them about \$40, and that he also paid \$24.12 to the sheriff.

It was admitted that a Mr. Sinclair defended the ejectment, and signed the judgment of *non pros.* and issued the

execution thereon, and opposed the application to set aside the *non pros.* on the 16th June, 1866 : that the order setting the *non pros.* aside was granted on that day, but was not taken out until the 22nd October, 1866, and served on the 27th October : that on the application of Sinclair the order was set aside, and that the case of *Herr v. Douglas*, 26 U. C. 357, is a report of the case ; and it was also admitted that the reason why the order was set aside, was on the ground of laches in not taking it out.

A written retainer signed by plaintiff, and addressed to Toms & Moore in *Herr v. Douglas* was put in.

On the part of the defence the defendant was examined who said that he remembered the plaintiff speaking to him about the matter, and he wished defendant to write to Davidson : that he did, and got a reply, which was produced, relating how the matter stood, and asking him to attend to the case for plaintiff : that he got the papers in the cause, and acted on the instructions contained in Davidson's letter, and got Mr. Moore to write to their Toronto agent : that he did not see the plaintiff for six months after, the first entry in his docket being 21st January, 1867 : that the plaintiff desired steps to be taken to oppose the rule *nisi* to set aside the order setting aside the *non pros.*, and that he took the advice of counsel in opposing the rule to set aside the order ; that he told the plaintiff the state of the case, and that his town agent said the judgment would be set aside, and that the plaintiff told defendant to go on.

At the close of the case it was objected for defendant that no retainer was shewn : that the defendant having employed a fit and proper person as his town agent was not responsible for the negligence of such agent ; and that no negligence was shewn.

The learned Judge found that the plaintiff had paid defendant on account of costs \$89.16, which together with costs of defence in the ejectment, \$24.12, made \$113.28, and he found a verdict for the plaintiff for that amount.

During last term *J. K. Kerr* obtained a rule *nisi* to set aside the verdict, on the grounds, 1. That there was no con-

tract proved to render defendant liable for negligence. 2. That the relation of attorney and client was not proved. 3. That defendant was not responsible for the negligence of his Toronto agent. 4. That the evidence did not shew such negligence as would render the defendant liable; and also to reduce the verdict as the Court might think fit, pursuant to leave.

In the same term *Robinson*, Q. C., shewed cause, citing *Collins v. Griffin*, Barnes 37; *Ex parte Jones*, 2 Dowl. 161; *Robbins v. Fennell*, 11 Q. B. 248, 256; *Withers v. Parker*, 5 H. & N. 725; *Ch. Arch. Prac.*, 12th ed., 156.

*J. K. Kerr* supported the rule, and cited *Chapman v. Boulton*, 13 C. P. 372; *Purves v. Caudel*, 12 Cl. & Fin. 100; *Kemp v. Burt et al.*, 1 N. & M. 262; *Pitt v. Yalden*, 4 Burr. 2063; *Jacks v. Bell*, 3 C. & P. 316; *Laidler v. Elliott*, 3 B. & C. 738; *Lowry v. Guilford*, 5 C. & P. 234; *Elkington v. Holland*, 9 M. & W. 659; *Godefroy v. Dalton*, 6 Bing. 460, *Ch. Arch. Prac.*, 95, 96.

MORRISON, J.—It was conceded on the argument by Mr. Kerr that the attorney in the country is answerable for the negligence of his Toronto agent, and the case resolves itself into two points: whether there was evidence of a retainer by the plaintiff of the defendant so as to charge the defendant with negligence, and, if so, did the evidence at the trial justify the learned Judge in finding there was negligence, and a verdict in favor of the plaintiff?

As to the first point, we think it is quite clear that the defendant was retained by the plaintiff to apply for and obtain an order to set aside the judgment of *non pros.* in question.

As to the remaining point, of negligence. It appears that the defendant made the necessary application and obtained a summons on the 3rd April, 1866, to set aside the judgment and execution thereon. The matter was argued before the learned Chief Justice of the Common Pleas, and he decided that an order should issue setting aside the judgment, &c., with costs, which decision was delivered on the



16th June, 1866 ; but the order so granted was not taken out or acted upon until the 22nd October following, and on the 27th October it was served by the defendant on the attorney for the defendant in the ejectment suit. In Michaelmas Term following (see *Herr v. Douglas*, 26 U. C. R. 357) a motion was made in this Court to set aside the order for, among other grounds, that the order was lapsed and abandoned by reason of the delay and laches in taking it out, and upon the ground of waiver.

The Court gave judgment setting aside and rescinding the order, being of opinion that the delay was a waiver of the order, and that being so waived, the plaintiff could not treat it as an order to the benefit of which he had any claim or title. Afterwards an application was made by the defendant on the part of the plaintiff in Chambers, on the 16th March, 1867, and a summons granted again to set aside the same judgment of *non pros.*, upon the ground that there was no authority or warrant in law justifying the entering of the judgment, &c. : that in fact it was a nullity. The case was heard before the learned Chief Justice of this Court, who held that the entering of the judgment was not a nullity, but an irregularity, and discharged the summons with costs : See *Herr v. Douglas*, 4 P. R. 105.

It was strongly urged by Mr. Kerr that the point involved in the charge of negligence was a new and doubtful one, and that the case presented against the defendant was not one of gross negligence, or such negligence as would render the defendant liable as an attorney : that the defendant was acting under the advice of able counsel, and was therefore not chargeable with negligence. Now the principal neglect complained of was the defendant not taking out and making use of the judge's order which he was employed to apply for, and which had been granted, to set aside the judgment of *non pros.* and execution which issued on it against his client, the plaintiff. That judgment and execution remained in full force against the plaintiff, and he eventually had to pay the amount recovered by it, while if the defendant had acted promptly upon the judge's order



he had obtained, the judgment and execution would have been set aside and vacated. The attorney ought to have known that the *fi. fa.* in the sheriff's hands against his client would remain in force as it did, unless the order was acted upon. It seems to me whether the order was become abandoned by laches and delay or through inadvertence, it was allowed to lapse by not taking it out, it was in either case gross negligence in the attorney. The principal, if not the sole, object of the plaintiff's retainer, was for the defendant to obtain the order he did obtain, and effectually make use of it. The very nature of the proceeding suggests of itself promptitude in acting upon the order, to relieve the client from the effects of the irregular judgment and execution, and if the defendant had done so, he would have saved his client the amount he had to pay the sheriff, and avoided all the subsequent ineffectual proceedings and costs.

In my opinion there was evidence of negligence sufficient to justify the verdict, and I cannot say that there was any point of doubt or difficulty involved.

As to the suggestion that the defendant was acting under the advice of counsel, as said by Tindal, C. J., in *Godefroy v. Dalton*, 6 Bing. 469, "We lay no stress upon the fact, that the attorney had consulted his counsel, \* \* because we think his liability must depend upon the nature and description of the mistake or want of skill which has been shown, and he cannot shift from himself such responsibility by consulting another when the law would presume him to have the knowledge himself." And the case before us is within the class of cases referred to by Chief Justice Tindal in the same judgment, in which the attorney is liable for the consequences of ignorance or non-observance of the rules of the practice of the Court, and for the management of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession.

I therefore think we ought not to disturb the verdict.

WILSON, J., concurred.

*Rule discharged.*

## REGINA V. LABADIE.

·32-33 Vic. ch. 22, sec. 7 D—Arson—“*Building*,” definition of.

The remains of a wooden dwelling house, after a previous fire, which left only a few rafters of the roof, and injured the sides and floors so as to render it untenable, and which was being repaired: *Held*, not a building, within sec. 7 of 32-33 Vic., ch. 22, so as to be the subject of arson.

THE prisoner was tried and convicted before Hughes, C. C. Judge of Elgin, sitting for Galt, J., upon an indictment for arson at the last Chatham Assizes, and the learned Judge reserved the following case for the consideration of this Court:—

It was alleged in the indictment that the said Alexander Labadie did “feloniously and maliciously set fire to a certain building,” the property of one Malcolm McKerrall, on the 22nd day of March, 1872, at Chatham.

It appeared in evidence that the fabric set on fire was the remains of a wooden dwelling house, framed and built of and covered with wood, which, by the act of an incendiary, had been partly consumed by fire in the month of January last, so that the roof was almost entirely gone; only a few of the rafters were left remaining; the sides were greatly damaged by fire; the plastering and walls and floors were left in so damaged a state that it was untenable; it was what the witnesses described as the relics of the building—that is, if walls and partitions standing on their original foundation, and not lying on the ground or thrown down or prostrated, and without a roof, can be regarded as “relics.” Repairs had been commenced to restore it to its former usefulness as a dwelling house at the time of the fire in March, in which the prisoner took part, and which last-named fire was the subject of this indictment.

At the close of the case for the Crown, *Atkinson*, for the prisoner, objected that there was no proof of any statutory offence having been committed, as the subject of the indictment was not the burning or setting fire to a

“building” within the intent and meaning of the 7th section of the Dominion Statute, 1869, respecting malicious injuries to property (chapter 22), but that it was only the remains or relics of a building previously destroyed.

The jury convicted the prisoner, and the learned Judge reserved the question for the determination of this Court, as to whether, or not, he could be legally convicted of the said offence under the evidence.

*The Attorney-General*, for the Crown.—Sec. 7, ch. 22, 32–33 Vic., is wide enough to include such a structure as that in question. The words of the section are in fact as comprehensive as language can make them. Section 6 of the Imperial Act, 24 & 25 Vic., ch. 97, is similar to this section, and the interpretation put upon that section in *Archbold's Criminal Pleading*, 490–510, 17th edition, supports the contention of the Crown. See also *Regina v. Edgell*, 11 Cox 132. *Regina v. Manning*, L. R. 1 C. C. 338, shews that the structure need not be completed to make it a building, and the fact that repairs had been commenced on it, so that it was in progress towards completion as a building, is very material.

*Robinson*, Q. C., contra.—It would seem from the authorities that the question whether this was a building within the meaning of the Act was one for the jury, and should have been left to them. It was reserved, however, as a question of law, and for the purposes of the trial the structure was assumed to be a building, which in fact it was not. It was, as the witnesses described it, the relics of an old building, which were being used in the erection of a new one, and admitting that entire completion is not necessary, the work here was not sufficiently advanced to form a building; the roof was nearly gone, and it was not tenantable: *Regina v. Manning*, L. R. 1 C. C. 338; *Bishop on Crim. L.*, vol. i., p. 173; *Regina v. Worrall*, 7 C. & P. 516; *Commonwealth v. Squiers*, 1 Metcalf 258; *Roscoe Crim. Ev.*, 274; *Russell on Crimes*, vol. ii., p. 1030, note l.

MORRISON, J.—Much difficulty has arisen in criminal cases of this nature, as well as that of burglary, as to what constitutes buildings, houses, &c., specifically named in the various statutes.

Our own Act, 32–33 Vic., ch. 22, in the 2nd, 3rd, 4th, 5th, and 6th sections uses almost every name, term, and description by which particular buildings are called or generally known, and the Legislature has deemed it expedient, in the 7th section, to further use the comprehensive term “building,” so as to include every possible fabric or erection coming within that term.

That section enacts: “Whoever unlawfully and maliciously sets fire to any building, other than such as are in this Act before mentioned, is guilty of felony.”

The prisoner is indicted for setting fire to “a certain building,” and the question is, does the evidence, as reported by the learned Judge, shew setting fire to a building of any kind.

From the report of the case, the learned Judge must be taken to have told the jury, for the purposes of the trial, that what was alleged as set fire to was a building within the meaning of the Act. Now the case shews it to be the remains of a wooden dwelling house, that had been so much injured by a previous fire that the roof was almost entirely gone; that only a few of the rafters were left; that the sides were greatly damaged, and that it was untenantable. It was described by the witnesses as the relics of the building.

I can find no case, and none was cited, giving a judicial meaning of the word building. The absence of authority is accounted for by the statutes describing almost every structure by its distinguishing and well known appellation, coming within the generic term of building.

Webster defines it to be “a fabric or edifice constructed for use or convenience, as a house, church, a shop, &c.” The Imperial Dictionary gives the same definition.

In the case of *Elsmore v. The Inhabitants of St. Briavells*, 8 B. & C. 461, the question was, whether the building



which was set fire to came within the description of a house, outhouse, or barn. It appeared to have been built for the purpose of being used as a dwelling house; but it was in an unfinished state, and had never been inhabited. Bayley, J., in giving judgment, said: "There cannot be any doubt that the building in this case was not a house in respect of which burglary or arson could be committed. It was a house intended for residence, but it was not inhabited. It was not, therefore, a dwelling house, though it was intended to be one. It was not an outhouse, because it was not parcel of a dwelling house. But it was contended it was a barn, because it had been used for those purposes for which a barn is used. The building had three stories, chimneys, a staircase, and windows. The plaintiff had deposited in it a quantity of straw and agricultural implements. On consideration, we are of opinion that this building was not a barn, within the meaning of that word as it is used in this statute. It was a house applied to those purposes to which a barn might be applied."

After referring to the statute, providing that a capital offence should be committed against that statute by such burning, Bayley, J., says: "The statute, therefore, with reference to a case like the present, must be construed strictly; and, so construing it, we are of opinion that the building consumed by fire in this case was not a house," &c., "within the meaning of this Act of Parliament; and in this opinion Lord Tenterden, with whom we have conferred upon this case, concurs."

In this case it was contended that a house intended for a dwelling house, but which had not been completed and had never been inhabited, was not a house within the meaning of the Legislature.

In *The Queen v. Colley et al.*, 2 Moo. & Rob. 475, an indictment for setting fire to a stable, the evidence was, that the building was built for and had been used as a stable, but for eight or ten years had been allowed to fall into decay; the manger and racks had been removed, the roof partly fallen in, and the building was used as a shed only.

Cresswell, J., interposed, and said that the building, in its present state, could not be considered a stable; the description in the indictment must be made out by evidence of its present state, whereas now it was merely a shed.

This was before the 7 & 8 Vic., which includes a shed, and an acquittal was directed.

If we apply the reasoning adopted in this latter case, what was set on fire by this prisoner, in its then present state, was the remains, or, to use the expressions of the witnesses, the relics, of a house, which remains were being used for or in the construction of a building intended on completion to be used as a house.

Can those remains, in their then state, be called a building? I think not, any more than the framework of a frame building partly up, say without the roof, can be called a building. It is only a state of progress towards a building. At what state of progress could it be called a building—when the sills are put in their place, or when the plates are placed to receive the roof?

Applying the principle laid down in the case in 8 B. & C., that decision shews that, if the indictment sets out any of the buildings mentioned in the sections preceding the 7th section, the evidence required to support the indictment must shew the building or erection to be one of the kind specifically mentioned, not one in an unfinished state and that could not be used.

Now the seventh section of our Act was intended to cover and include every other kind of building not otherwise mentioned in the Act, and there are many to which it would refer, and the same principles must apply to every other such building included within its provisions.

These statutes must be construed with strictness. If the Legislature intended that any person who should set fire to a building while in progress of construction should be guilty of felony, or that partially destroyed structures, such as the one in question, should be subjects of arson, it should have said so in clear terms.

On consideration I do not think there was any evidence to support the indictment in this case. What was set fire to was not, in my opinion, a building, within the terms used in the statute, and the prisoner ought not to have been convicted.

No objection was taken to the form of the indictment. It seems to me, although I give no considered opinion on the point, that the indictment should set out the nature of the building, according to the form given by the Procedure Act 32-33 Vic., ch. 29, for malicious injuries to property. If that form had been followed here, it would have suggested great difficulties in the way of a conviction.

WILSON, J., concurred.

*Conviction set aside.*

# ILER V. ELLIOTT ET AL.

*Ejectment, alienage—Will, construction of—Estate tail.*

**Ejectment.** In 1821 J. S., with his son Samuel, and his daughter H., (who afterwards married M., a British subject) came from the United States, and settled in Canada, all being aliens. On the 20th March, 1821, the Crown granted the land in question to J. S. Neither J. S. nor his children ever took the oath of allegiance. J. S. died on the 17th May, 1828, and Samuel about the 6th Nov. 1842 :

**Held**, that under the Alien Act of 1828, assented to on 10th May, 1828, J. S. was a British subject, for it might be presumed that he took the oath when he got the patent; and if not, having died before 1st January, 1850, the period limited by the Act for taking such oath, he was by sec. 13 empowered to take and hold real estate.

**Held**, as to Samuel, that not having taken the oath under the Acts of 1828 or 1841, he was an alien.

**Held**, also, as to Hannah, that having been a resident of the Province on the 1st March, 1828, for seven years, she became a British subject under sec. 2 of the Act of 1828, and also, by intermarriage with a British subject, under 12 Vic. ch. 197, sec. 10; and as coming within 4 & 6 Vic. ch. 7.

**Semble**, per Wilson, J., that Samuel, if an alien, would have had the same power to devise as he had to convey by deed.

**Semble**, also, per Wilson, J., that the alienage of J. S. could not have been objected to in his lifetime, except by the Crown, so as to affect his title, and not by the Crown unless deceived as to his *status*.

J. S. demised the lands on the 22nd March, 1824, to Hannah, his daughter, for life, and after that to her husband if he should survive her, at a nominal rent. On the 24th March, 1828, he by his will devised to his son Samuel all his lands by him “freely to be possessed and enjoyed \* \* ”



after the death of Hannah and her husband "if she dies without heirs." J. S. died in May, 1828. Samuel before his death in 1842 had given a bond for a deed of the land to one I., and the trustees under his will conveyed in fee to I. in 1871. Hannah died in 1869 without issue, and her husband in 1864.

*Held*, that under the devise in the will of J. S. Hannah took a fee, by reason of Samuel's incapacity through alienage to inherit as her heir-at-law, the intervention of the possible estate for life of Hannah's husband making no difference.

If Samuel had been capable of inheriting, Hannah would have taken an estate tail only, with remainder to him in fee; for the limitation over to him on failure of heirs would be restricted to lineal heirs, he himself being a relative, and capable of being a collateral heir.

*Quære*, whether Samuel if not an alien would have taken in fee or for life under the words "freely to be possessed and enjoyed," &c., in the will of J. S.

*Quære*, also, whether sec. 12 of 12 Vic. ch. 197. has any relation to titles previously acquired.

The defendant was held not estopped from setting up the alienage of Samuel, for he claimed under Hannah, whose title he supported against that of Samuel.

EJECTMENT for that part of lot No. 41, in the front or first concession of the township of Colchester, which has been known and occupied as the Nolan lot, containing 50 acres, more or less.

Thomas Elliot, one of the defendants, defended for the whole lot.

The plaintiff claimed title under an indenture, made between Jacob Iler and the plaintiff, dated the 7th of August, 1871.

The defendant Thomas Elliott, beside denying the plaintiff's title, claimed title in himself under a conveyance from Hannah Nolan.

The cause was tried at the last Fall Assizes, at Sandwich, before Gwynne, J., and a verdict was rendered for the plaintiff, subject to the opinion of the Court, upon the evidence and the objections set out below.

The facts proved were as follow: The whole lot was granted by the Crown to John Snider, on the 20th March, 1821. John Snider, by indenture, dated 22nd March, 1824, demised the 50 acres in question to his daughter Hannah, the wife of Henry Nolan, for her life, and after that to her husband, if he should survive her, at the yearly rent of one peck of corn, the demise to begin from 30th March, 1824.



By his will, dated 24th of March, 1828, John Snider gave to his son Samuel "all and singular my lands, messuages, and tenements, by him freely to be possessed and enjoyed, together with" (describing the land in question), "after the decease of my daughter Hannah and her husband, if she dies without heirs."

John Snider died in May, 1828. The petition for probate, filed on the 31st of May, 1828, stated that he died about the 17th May, 1828.

Samuel Snider was the heir-at-law of John Snider, assuming alienage not to have existed.

Samuel Snider, by bond dated the 13th of February, 1830, agreed to give to Jacob Iler a deed in fee of the land in question, the fifty acres of land devised by John Snider and leased to Hannah and her husband for life in case Hannah should die without heirs of her body.

Samuel Snider made his will, dated 6th of November, 1842, and died shortly afterwards. By it he devised his lands unto the trustees and executors of his will, and to the survivors and survivor in fee.

Hannah never had any issue of her marriage. She died about two years ago, and her husband about seven years ago.

By indenture, dated 2nd of February, 1871, Francis John Bunt and Henry Snider, the surviving executors and trustees of the will of Samuel Snider, conveyed to Jacob Iler the fifty acres in question in fee.

By indenture, dated the 7th of August, 1871, Jacob Iler conveyed the land in question to the plaintiff in fee.

John Snider came from Pennsylvania in 1821, and his father from Germany. All his children were born before he came to Canada. Samuel was born in the United States, after 1783. Neither John Snider nor his children appeared to have taken the oath of allegiance. Hannah's husband was a British subject.

The counsel for the defendant offered no further evidence than the lease from John Snider to his daughter Hannah and her husband.

Several exceptions were taken at the close of the case, by the defendant's counsel, and the learned Judge said, the

main point appeared to be, what was the effect of the devise in question by the will of John Snider: *i. e.*, what was the effect of a devise made before 1834, to the heir-at-law after the death without heirs of a daughter of the devisor—whether it created by implication an estate in fee in her, or what other estate.

A verdict having been rendered for the plaintiff, as above mentioned :

In Michaelmas Term *O'Connor* obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a verdict entered for the defendant Thomas Elliott, or a nonsuit, on the grounds :

That the verdict was contrary to law and evidence.

That John Snider, the patentee, and Samuel Snider, through whom the plaintiff claims, were aliens and incapable of transmitting real property by inheritance, will, or otherwise.

That the devise to Samuel Snider, relating to the land in question, even if valid, gave only a life estate at most, and was contingent and executory, and the contingency did not occur, because Hannah, the daughter of John Snider the testator, did not die without heirs.

That the will of Samuel Snider, even if valid, did not affect the title, and that title was shewn out of the plaintiff and in a third party or parties, by length of possession.

And that the lease for life from John Snider to Hannah, his daughter, and her husband, was invalid and void.

In Hilary Term last, *Holmested* shewed cause. The defendant set up at the trial that both John Snider and his son Samuel were aliens; but he was prevented from setting up such a defence, because he claimed title under Hannah, the daughter, and the lessee and devisee of John Snider: *Cuthbertson v. Irving*, 4 H. & N. 742; *Doe d. Colemere v. Whitroe*, D. & R. N. P. C. 1.

On the question of alienage he referred to, *Doe d. Richardson v. Dickson*, 2, O. S. 292; *Doe McDonald v. Cleveland*, 6 O. S. 117; *Doe d. Hay v. Hunt*, 11 U. C. .

367, 389 ; *Fitch v. Weber*, 6 Hare 51, 59 ; 2 *Kent's Com.* 60 ; *Doe d. Auchmuty v. Mulcaster*, 5 B. & C. 771 ; *Montgomery v. Graham*, 31 U. C. R. 57.

The devise to Hannah was an estate tail, by implication : an estate tail special, confined to such issue as she might have of her then marriage : *Fearne*, 10th ed., 466 ; *Jarman on Wills*, vol 1, 3rd ed, 497 ; *Re Blake's Trusts*, L. R. 3 Eq. 799 ; *Humphreys v. Humphreys*, L. R. 4 Eq. 475. She could have barred her entail under our own Statute. It was said she did make a deed in fee simple of the land, but no such deed was registered, and without registration it was void. On her death her estate was determined, and the reversion took effect as an estate in possession, in the trustees and executors under Samuel's will, under whom the plaintiff claims title. The rent which Hannah and her husband were to pay under the lease was only nominal, and so twenty years' non-payment of it would not prejudice the reversioner ; but even if it had been a rack rent, the reversioner would have a right of entry on the determination of the lease : *Doe dem. Davy v. Oxenham*, 7 M. & W. 131 ; *Grant v. Ellis*, 9 M. & W. 113 ; *Leith's Blackstone*, 205 ; C. S. U. C. ch. 88, secs. 4, 5, 10. As to lease to Hannah Nolan, see *Nolan v. Fox*, 15 C. P. 565.

*Moss* supported the rule. If John Snider were an alien, no descent was cast on Samuel his son. John was born in Pennsylvania and did not come to this country till 1821 ; *primâ facie*, he was not a British subject. A residence in the United States for ten years after the treaty was held to be an election to remain a citizen of that country : *Montgomery v. Graham*, 31 U. C. R. 57. Samuel also was born in the United States, and, as the evidence shews, after the year 1783. Before the 12 Vic. ch. 197, an alien could not transmit by descent. On this point he referred to *Irwin v. McBride*, 23 U. C. R. 570 ; *Doe dem. O'Connor v. Maloney*, 9 U. C. R. 251 ; *Wallace v. Hewitt*, 20 U. C. R. 87 ; *Wallace v. Adamson*, 10 C. P. 338. The defendant is not estopped from setting up the alienage, for the lease has expired now.



This is not an estate tail special, but an estate tail general: *Blinston v. Warburton*, 2 K. & Johns. 400; S. C. 2 Jur. N. S. 858; *Re Wilts, Somerset, and Weymouth, R. W. Co's Act*; *Ex parte Davies*, 2 Sim. N. S. 114. If Hannah had an estate tail, she barred it by her deed. The non-registration of it would prevent it from barring those in remainder. Samuel took an estate for life only in this land in question; but if he could take as heir-at-law, he would have the reversion: *Goodright dem. Drewry v. Barron*, 11 East 220; *Doe dem. Ashby v. Baines*, 2 Cr. M. & R. 23; S. C. 5 Tyr. 655; *Bromit v. Moor*, 9 Hare 374.

As to the Statute of Limitations, *Doe dem. Davy v. Oxenham*, 7 M. & W. 131, shews that the reversioner might enter on the termination of the lease. But if the lease were void, as creating an estate of freehold *in futuro*. then the Statute of Limitations does apply. *Nolan v. Fox*, 15 C. P. 565, was a decision on the title now under discussion.

WILSON, J.—If John Snider were an alien, his alienage could not, probably, have been objected to in his lifetime, so as to affect his title to this land, even at the instance of the Crown, unless on an allegation that the Crown had been deceived, which the Crown could alone have set up. And it is not likely that any such deception had been practised, nor that the Crown was misinformed what his *status* was when the grant was made.

The Crown grant will never enure to a double intent, as where land is granted to an alien, it does not make him a denizen: *Vin. Abr. "Alien," D. 2*.

Nor could the Crown declare that an alien, eldest son of the grantee, shall inherit, for that would be to alter the law: *Vin. Abr. "Alien," F. 1-6*.

The Alien Act, 9 Geo. IV. ch. 21, which received the Royal assent on the 7th of May, 1828, is that which applied to John Snider.

One of the witnesses said he died in the month of May, 1828, but the petition for probate presented by the execu-



tors on the 31st May, stated that he "departed this life about the 17th of May, 1828."

The evidence shews he died some few days after the passing of the Act referred to.

By the first section of the Act, John Snider, as a person who had received a grant of land in this Province from the Crown, was not made a British subject until he had taken the oath of allegiance, as required by the Act. That oath, however, might be presumed to have been taken when he got the patent; but if not, it still would be of no consequence, for no time is named within which the oath, under the first section, was to be made; and, by the 9th section, all oaths under the Act were to be taken before the 1st of January, 1850. And, by the 13th section, any person who was not entitled to be regarded as a natural born subject, and who, at the time of the passing of the Act, was domiciled in "the Province, and who died before the period limited by the Act for taking the oath, "shall be nevertheless deemed to have been a natural born subject of his Majesty, so far as regards the taking, holding, imparting, and transferring of any real estate by grant, marriage, dower, devise, or inheritance."

As John Snider died within about ten days after the passing of the Act, and was at the passing domiciled in the Province, and as he had probably the period of his lifetime within which to take the oath, although not later than the 1st of January, 1850, he may be said to have been a person who died before the time limited by the Act for taking the oath. And so he was entitled to be regarded as a natural born subject.

This enables us to dispose of the objection, that, being an alien, he could not make a will. If that question, which does not seem to have been finally settled, had to be pronounced upon, I should have thought there was the same power by an alien to devise as there was to convey by deed. The will has some effect in the lifetime of the devisor, for the period of thirty years, after which it proves itself, begins to run from the time it was made.

It is quite clear that a devise may be made to an alien, the same as a conveyance *inter vivos* may be made to him: *Barrow v. Wadkin*, 24 Beav. 1, S. C. 3 Jur. N. S. 679, and the cases cited in it.

Hannah Nolan, the daughter of John Snider, appears to have been within the second section of the Act of 1828, a resident in the Province on the 1st of March, 1828, and one who had resided therein for seven years. She, therefore became a subject, without taking the oath of allegiance. She would also have been within the Acts of 4 & 5 Vic. ch. 7, and 12 Vic. ch. 197, if not within the earlier act. She would, also, as the wife of a subject, under the 12 Vic. ch. 197, sec. 10, be constituted a British subject.

Samuel Snider did not take the oath of allegiance, either under the Act of 1828 or under the Act of 1841. No later act applied to him, for he made his will in November, 1842, and died shortly after making it.

There is evidence that John Snider originally was, and Samuel Snider continued to be an alien up to the time of his death.

In order to apply this state of things, it must be settled what estate the will of John Snider, referred to on the argument, conferred upon Hannah and upon Samuel, or upon either of them.

The devise to Samuel, the son, "after the decease of my daughter Hannah and her husband, if she dies without heirs," would, if Samuel had been capable of inheriting, having conferred an estate tail on Hannah and the remainder in fee on Samuel.

Generally, a devise to one and if he die without heirs over, imports a general failure of heirs, and any subsequent limitation is void, as too remote; for such a limitation should, to be valid, take effect within the period of a life in being and twenty-one years afterwards: *Fearne* on Contin. Rem. & Ex. Dev. 430, 432, 434 and note *K.*, and 466, 468: *Jarman* on Wills, 3rd ed., ch. 41, sec. 1, p. 473.

There is an exception to this rule, when the devise goes over after the devisee dying without heirs, and it is this:

"If the person to whom the limitation over is made be a relative of and capable of being collateral heir to the first devisee, the first devisee takes only an estate tail, because the limitation over to the collateral heir plainly denotes that only lineal heirs could have been intended. As where *A.* devised lands to *B.* and his heirs, and for want of heirs of him to *D.*, it was adjudged an estate tail only in *B.* because *D.* was a near relative and heir to *B.*, and therefore *B.* could not die without heirs so long as *D.* or any of his lineal heirs existed: *Fearne* Con. Rem., 10th ed., 466.

So also it is said, "But, whenever the remainder, after dying without heirs, is limited over to one who is not heir to the first devisee, such after limitation does not alter the preceding positive devise in fee:" *Fearne* Con. Rem., 10th ed., 467; *Pickering v. Towers*, 1 Eden 142. "Where the testator devised to his son and his heirs, and if he should die without heirs remainder over to another, who was half-brother to the first devisee; on a question made, whether the first limitation was in fee or in tail, Lord Hardwicke said, it was a plain case, and one of those points which the Court would not suffer to be argued, as having been determined before. This was a devise to a stranger, as the law considers him, and who could not in any event inherit as heir to his brother": *Fearne* Con. Rem., 10th ed., 468.

The general operation of the word "heirs" in the devise to Hannah, will not be restrained in favor of Samuel, an alien. See *Theobalds v. Duffoy*, 9 Mod. 102, 104.

The devise, "to Hannah and if she die without heirs then over," is just the same as a devise, "to Hannah and her heirs, and if she die without heirs then over": *Boden v. Watson*, Ambler 398, 478; *Love v. Windham*, Lev. 290. In my opinion, Hannah took an estate in fee, by reason of the incapacity of Samuel to inherit as her heir-at-law. See also *Rittson v. Stordy*, 1 Jur. N. S. 771, 2 Jur. N. S. 410.

Upon the death of Hannah Nolan the property passed to her heir-at-law. Whether there is such a person in law may be doubted.

It is very probable the land has escheated to the Crown,



and no doubt the Crown, as is usual in such cases, will, on office found, if the title has passed to the Crown, grant it to the person who is equitably entitled to it, and who appears certainly to be the plaintiff in this action, as the claimant under Samuel, the brother of Hannah Nolan. The following cases may be referred to in the construction of the word "heirs," and the like expressions: *Re Wilts, Somerset and Weymouth R. W. Co's Act*; *Ex parte Davies*, 2 Sim. N. S. 114; *Doe d. King v. Frost*, 3 B. & Al. 546; *Hennessey v. Bray*, 9 Jur. N. S. 1065; *Jordan v. Adams*, 6 C. B. N. S. 748, in Ex. Ch. 9 C. B. N. S. 483; *Coltsman v. Coltsman*, L. R. 3 H. L. 121; *Blinston v. Warburton*, 2 K. & Johns. 400, S. C. 2 Jur. N. S. 114.

That Hannah's husband would have taken an estate for his life, if he had survived his wife, before the general heirs of Hannah would have taken, or before Samuel, as reversioner in fee, would have taken, if he could have taken, would have made no difference. Such an estate may interpose before the reversioner's interest: 2 *Jarman on Wills*, 3rd ed., ch. 33, sec. 3, p. 251.

Whether Samuel, if he could have taken, would have taken an estate in fee, or only for his life, by reason of the words "freely to be possessed and enjoyed," it is not material to consider.

*Goodright dem. Drewry v. Barron*, 11 East 220; *Doe dem. Ashby v. Baines*, 2 C. M. & R. 23, S. C. 5 Tyr. 655; *Bromit v. Moor*, 9 Hare 374, are cases where the devise was not to the heir-at-law, or one whom the testator considered to be his heir-at-law. And here, too, the devise was to take effect after an estate in tail, when a life estate would not be so likely to be presumed. See also *Doe dem. Booley v. Roberts*, 11 A. & E. 1000, where the words, "with all my property," were held to be a sufficient indication that the fee was intended to be passed.

If Samuel Snider had been living when the 12 Vic., ch. 197, was passed, it is possible that, under the 12th section, his title might have been valid; but it is not



clear that that clause has any relation to titles acquired before the passing of the Act.

I think the defendant was not estopped from shewing the alienage of Samuel, for he did not claim under Samuel, but under Hannah, whose title he does not impeach, but sustains against the title of Samuel.

He was at liberty to shew that Samuel [could] not be, and was not, the heir-at-law of John Snider or of Hannah Nolan.

In our opinion, the rule should be made absolute to enter a verdict for the defendant; but, as the plaintiff's counsel suggests he can prove a better case, the rule will be to enter a nonsuit.

MORRISON, J., concurred.

*Rule absolute to enter a nonsuit.*

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#### RE CAMPBELL, AN ATTORNEY, &C.

*Attorney—Non-payment of money—Attachment—Striking off the rolls—Execution.*

The proper proceeding against an attorney for mere non-payment of money pursuant to a rule of Court, where there are no special circumstances shewing fraud or dishonesty, is by judgment and execution under C. S. U. C. ch. 24, sec. 15, and not by motion to strike him off the rolls, nor by attachment.

Under the Imperial Act, 32 & 33 Vic. ch. 62, sec. 4, sub-sec. 4, attorneys ordered to pay money in that character are excepted from the general rule, and may be attached as before. There is no such exception in our Act.

IN Hilary Term last, *J. K. Kerr* obtained a rule calling on the attorney to shew cause why a rule or order of this Court should not be made to strike the name of the said attorney from the rolls of this Court, on the ground that he had failed to pay over to George Moffatt or to his attorneys, Messrs. Bell, Holden & Bell, the sum of \$275.14 ordered to be paid by him to the said George Moffatt or to his said attorneys, upon grounds disclosed in affidavits and papers filed. A copy of this rule was personally served on the attorney on the fourteenth of February,

1872. The rule was enlarged by Mr. Kerr until this term, with the consent of Mr. Osler, who acted for the attorney,

The rule was obtained on the following papers: the rule of Hilary Term of the Practice Court, making the order of Mr. Dalton, the Clerk of the Crown and Pleas of this Court, made in Chambers, and the Master's allocatur endorsed thereon, a rule of this Court, with the costs of the application for the said rule. The order made in Chambers was dated the fifth of February, 1872, and directed the attorney to pay over to George Moffatt, of the City of Montreal, or to his attorneys, Messrs. Bell, Holden & Bell, the sum of \$237.50, forthwith after the service of the order upon him or his agents; and that the said attorney do pay the costs of the said application.

The allocatur was dated the seventh of February, 1872. It stated the costs of the application for the order at \$27.94. There was also an allocatur endorsed on the rule of the Practice Court, dated the eighth of February, 1872, stating the costs taxed on the said rule at \$9.70, which with the previous costs of \$27.94, amounted altogether to \$37.64.

On the ninth of February, 1872, a copy of the rule of the Practice Court and of the allocatur endorsed on it were served by Wm. D. Foss, a clerk in the office of Messrs. Blake, Kerr & Bethune, agents in this matter for Messrs. Bell, Holden & Bell, attorneys for George Moffatt, on Messrs. Harrison, Osler & Moss, agents for the said attorney, by delivering the same to Mr. Falconbridge, a member of the said firm, in their office in Toronto; and payment of the sum of \$275.14 was demanded of Mr. Falconbridge at the time of such service, but payment thereof was refused.

An affidavit was made by Charles W. Bell, a member of the firm of Bell, Holden & Bell, attorneys for George Moffatt, the applicant, that he had not, nor had any other member of the said firm, as they had informed him and as he verily believed, received from the said attorney, or from any person on his behalf, the sum of \$275.14, the amount found due from the said attorney to the said George Moffatt by the said rule thereunto annexed made in this

matter on the eighth of February, and the allocatur thereon endorsed, nor any part thereof, and he believed that the said sum still remained wholly unpaid.

In this term *Osler* shewed cause. The affidavit of non-payment is made only by the attorney. The mere non-payment of money by an attorney does not warrant the Court in striking him off the roll : *Guilford v. Sims*, 13 C. B. 370.

The attorney should have been proceeded against by attachment or by execution : *Chitty's Arch. Pr.*, 12th ed., 146 ; *Ex parte Townley*, 3 Dowl. 39 ; *Ex parte Grant*, 3 Dowl. 320.

The application should be discharged ; or at most, an execution should be ordered to be issued, if it can be done on the present motion.

*Kerr* supported the rule. The money by the order and rule was ordered to be paid to the applicant, or to his attorneys. The affidavit is sufficient. The applicant or client need not personally make the affidavit of non-payment. The motion is properly made.

The agent of the attorney consented to an enlargement of the rule from last term to this term, and that is a waiver of any mere defect or irregularity. He referred to the following cases : *The Queen v. Allen*, 5 Price 453 ; *Ex parte Burgin*, 1 Dowl. N. S. 292 ; *Hare v. Fleay*, 2 L. M. & P. 392 ; *Thompson v. Billing*, 11 M. & W. 361 ; *Ch. Arch. Pr.*, 12th ed., 147.

WILSON, J.—The principal question is, whether the attorney in default should be struck off the rolls for non-payment of the money he was ordered to pay, or whether he ought not to be proceeded against by attachment or execution.

It is, no doubt, a severe remedy to strike an attorney off the rolls, and to deprive him of his profession and of the means, it may be, of making a living, after years of time and study given to entitle him to be enrolled. And it



would appear to me not to be the proper course to proceed so summarily before taking other and less penal means, which may be quite sufficient to enforce the payment of a mere money demand.

What the practice is in such cases must be looked to, to ascertain what the procedure should be.

In *Ex parte Townley*, 3 Dowl. 39, Littledale, J., refused to grant a rule to shew cause why an attorney should not be struck off the rolls for disobeying an order, which was made a rule of Court, directing the attorney to assign the articles of one of his clerks. It was said an attachment was not moved for because the attorney could set it at defiance. The judge said, "Where an attorney has disobeyed a rule of Court he is in contempt, and the proper course then is to apply for an attachment against him. If he continue in contempt, the question will then arise as to the propriety of his continuing any longer on the roll; but we cannot at once, merely for a contempt, compel him to shew cause why he should not be struck off the roll." A rule *nisi* for an attachment was then granted. *Ex parte Grant*, 3 Dowl. 320, is to the same point.

In *Guilford v. Sims*, 13 C. B. 370, it is said, "The mere non-payment of money by an attorney, pursuant to an order and rule of Court, is no ground for striking him off the roll." Jervis, C. J., said, "There must be very special circumstances to justify such a course: mere non-payment of money will not do"; and it is added, "*per curiam*, attachment is clearly the proper course. There is no pretence for this motion." The rule to shew cause was refused.

In *Ex parte Brightmore et ux.*, 6 Jur. 15, the rule was for an attachment for non-payment of money. The rule absolute was granted in the first instance because the attorney had shewn no cause to the rule, which called upon him to shew cause why he should not pay the money, and because that rule had been enlarged at his own request.

In *re Bluck*, 6 L. T. N. S. 506, in the Bail Court, before Mellor, J., it is said, "If an attorney do not shew cause to



a rule calling on him to shew cause why he should not answer matters in affidavits and pay a sum of money, the Court will make the rule absolute to pay, and will grant an attachment for not answering.

In *re Worman*, 1 H. & C. 636, where an attorney did not shew cause to a rule calling on him to answer the matters of an affidavit, the Court made the rule absolute to answer the matters in ten days, and in default of his doing so that an attachment should issue against him, and that he should also be struck off the rolls.

For imputed criminal conduct the rule should be, to shew cause "why the attorney should not be struck off the rolls, or be suspended from practice for such time as the Court shall think fit." *Re an Attorney*, 7 L. T. N. S. 716.

In *re Wright*, 12 C. B. N. S. 705, the attorney was called upon to shew cause why he should not answer matters in affidavits charging him with the fraudulent appropriation of money given him to invest. Cause was shewn, and the Court referred the matter to the Master; he reported against the attorney; cause was then shewn to the report. Erle, C. J., said, "By the practice, two courses are open—first, to issue an attachment, to be followed by interrogatories. This we think an unnecessary delay and expense after the clear and complete examination of the case by the Master. The other is, to order that the attorney be struck off the roll, as was done in the case against Mr. Sills. We think the latter course the proper one under the circumstances of this case. But, as the attention of the attorney was not pointed directly to that result by the rule calling on him to answer the matters of the affidavit, we decide to enlarge this rule peremptorily to the sitting of the Court on the first day of next term, when, after hearing Mr. Wright again, if he should require it, the Court will give its final decision." The attorney was afterwards heard, but the Court ordered him to be struck off the roll, and to pay the costs of the proceedings, and in default of such payment that an attachment should issue against him; but that the writ should lie in the office for one month after issuing the same.

*In re Robinson*, 10 B. & S. 75, the Court refused to order an attachment against the attorney for not paying over money which he had been directed to pay by rule of Court, as the remedy for the disobedience of the rule was by proceeding under the 1 & 2 Vic. ch. 110, sec. 18.

*In re Rush*, L. R. 9 Eq. 147, an attachment was ordered for non-payment of money by the attorney.

*In re Sparks*, 17 C. B. N. S. 727, a rule was granted on an attorney to shew cause why he should not be struck off the rolls, on the ground that he had improperly appropriated to his own use moneys collected by him, and that he had become bankrupt. Erle, C. J., said, "I have listened attentively to the affidavits and to the arguments of counsel; and though the case is one of grave suspicion, I cannot say that I find any specific mis-appropriation of the client's money which would warrant me in taking the extreme course of removing this gentleman from the roll of attorneys. I therefore think the rule must be discharged; but, under the circumstances, I think it should be discharged without costs."

For gross fraud and dishonesty an attorney will be struck off the rolls: *Re Blake*, 3 E. & E. 34.

For misappropriation by an attorney, acting as clerk for other attorneys, of moneys paid into their office, an attorney may be struck off the rolls. In that case, under the circumstances, he was suspended from practice for a year: *Re Hill*, L. R. 3 Q. B. 543.

Now, taking a review of these cases, *Ex parte Townley*, 3 Dowl. 39, and *Guilford v. Sims*, 13 C. B. 370, both declare that an attorney will not be struck off the rolls "for the mere non-payment of money under a rule of Court." It was there said, the process of attachment was the proper proceeding; but as to that there is something to be said.

*In re Brightmore*, 6 Jur. 15, and *In re Rush*, L. R. 9 Eq. 147, attachments were issued to enforce the payment of money.

*In re Robinson*, 10 B. & S. 75, an attachment was refused,

because the proper proceeding was to issue an execution under the statute, corresponding to our C. S. U. C. ch. 24, sec. 15.

The attorney who is in contempt for not answering matters alleged against him, which no doubt was for something else than the mere non-payment of money, may be struck off the rolls and be attached also: *Re Worman*, 1 H. & C. 636.

For criminal misconduct the attorney may be struck off or suspended: *In re an Attorney*, 7 L. T. N. S. 716. So for fraudulent misappropriation of money: *Re Wright*, 12 C. B. N. S. 705; *Re Sparks*, 17 C. B. N. S. 727; *Re Hill*, L. R. 3 Q. B. 543. Or for gross fraud: *Re Blake*, 3 E. & E. 34.

Some of these acts of misappropriation were acts of embezzlement, and all of them had the element of fraud and dishonesty, and were therefore much more than "the mere non-payment of money."

It is clear that, as this case is a proceeding for the mere non-payment of money, the attorney cannot be struck off the rolls, as there are no "very special circumstances to justify such a course." There therefore "is no pretence for this motion."

Nor can an attachment issue in this case by reason of the Consol. Stat. U. C. ch. 24, sec. 13, "unless a special order for the purpose be made on affidavit or affidavits establishing the same facts and circumstances as are necessary for an order for a writ of *Ca. Sa.* under this act." And that course has certainly not been followed here.

Under sec. 4, subsec. 4, of the English Act 32 & 33 Vic. ch. 62, which is something like our Act, *Attorneys* who are ordered to pay money in their character of attorneys are excepted from the act, and may be attached as theretofore: *Re Rush*, L. R. 9 Eq. 147. There is no such exception in our Act.

We think the applicant should proceed by way of judgment and execution, under sec. 15 of Consol. Stat. U. C. ch. 24, before mentioned, which is said to be the proper method in preference to proceeding by attachment, even

where an attachment was grantable : *Re Robinson*, 10 B. & S. 75 ; and for that purpose he does not require the assistance of this Court.

And if the attorney continues after that process longer in contempt, it may be possible, though I do not say I entertain any opinion very favourable to it, "that the question will then arise as to the propriety of the attorney remaining longer on the roll : " per *Littledale*, J., in *Re Townley*, 3 Dowl. 39.

This rule must be discharged, but as the enlargement of it was with the consent of the attorney, and as he has now shewn no cause on the merits, and for anything we know he might as well have done so without an enlargement, we feel no disposition whatever to allow him his costs.

We have given no consideration to the different matters apparent on the proceedings : whether the affidavit of non-payment is made by the proper person, or is sufficiently specific ; or whether the demand was made by the proper person, no power of attorney being shewn ; nor whether the demand was properly made on the agent of the attorney or not, as to which see *Thomson v. Billing*, 11 M. & W. 361, cited on the argument. It has not been necessary to decide these questions.

MORRISON, J., concurred.

*Rule discharged, without costs.*

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## TENCH V. THE GREAT WESTERN RAILWAY COMPANY.

*Libel—Publication by agent of corporation—Privileged communication—16 Vic. ch. 99, sec. 10.*

The defendant, being the general manager of defendants' railway, had a hand-bill printed addressed to the defendants' employees, stating in substance that the plaintiff, a conductor on the road, had been dismissed from defendants' service for dishonest conduct, an envelope having been found addressed by him to a conductor on the New York Central Railway containing tickets used but not cancelled. In an action for libel in the publication of this notice :

- Held*, 1. That such action was not "for any damage or injury sustained by reason of the railway," within 16 Vic. ch. 99, sec. 10, so as to limit the action to six months.
2. That defendants were liable for the publication, as being an act done by the defendant, their general manager, in the ordinary performance of his duties, although not specially authorized by the directors.
3. That it would have been privileged if distributed only to the employees, or put up in the private offices of the Company where they alone had a right to be ; but that the putting it up in defendants' offices and stations open to the public was not justified, and was evidence of malice.

**LIBEL.** The declaration and the special plea of justification are fully set out in the report of the judgment given on demurrer : *Tench v. Swinyard*, 29 U.C. R. 319. Defendant also pleaded not guilty by Statute 16 Vic. ch. 99.

The action was brought for the publication of a libel in the form of the following hand-bill addressed to persons in the employment of defendants, on whose railway the plaintiff was conductor. "*Great Western Railway—Notice to the Company's employees.* It having come to the knowledge of the Company that an envelope was mailed at Hamilton containing four coupon tickets for passengers from Suspension Bridge to Detroit, which had been previously used, but not cancelled or returned to the audit office in accordance with the regulations, and which envelope was addressed in the handwriting of conductor Tench to a conductor on the New York Central Railroad, conductors and others are informed that conductor Tench has been dismissed from the service of the Great Western Company."

The cause was tried at the last Fall Assizes at St. Catharines, before Morrison, J.

The plaintiff was a conductor on the defendants' trains. The alleged libel was put up at the Suspension Bridge, one in the ticket office, and the other in the station master's office, where any one could see them. It was also at the St. Catharines station, and at the station master's office at Hamilton. A number of coupons removed from through-tickets and not punched were enclosed in an envelope addressed in the plaintiff's writing and by him to Mark Wells, Hamilton. There was no such person, but there was a person of that name who was a conductor on the New York Central, and who was at the Spencer House, Niagara Falls, but he had a house of his own there. The account given of this address was, that when the train, on the 6th of October, 1867, from the Suspension Bridge to Detroit was at Hamilton, some coloured persons,—one Rice was one, but the names of the others were not known—asked John Pearce, a customs officer for the American government who travelled on the defendants' train, to address the envelope to Mark Wells, Hamilton, and Pearce said as he could not leave the cars he gave it to the plaintiff and asked him to address it; that the plaintiff slipped into the office at Hamilton and addressed it, and handed it again to Pearce, who gave it to the parties from whom he got it. These parties, or one of them, was a coloured porter who was on the sleeping car. It was sealed up when Pearce got it. The plaintiff's account of it was to the same effect. He said he knew Mark Wells well, and saw him constantly. If the coupons were not punched they could be used again.

*Mark Wells* said he never got a letter from the plaintiff, and he had no arrangement with the plaintiff about tickets, or with any other man.

*Mr. Swinyard*, the manager of the railway at the time, said when he got this letter from the dead letter office, there having been no such person as Mark Wells, Hamilton, and when he discovered the address was in the plaintiff's writing, he suspended the plaintiff without any instructions; and that Mr. Robb, the detective on the line,

drew up the alleged libel as a warning to the employees, and for their information. He could not say the subject was ever before the board. The directors were, it was believed, informed individually of the matter, and it was thought also at a meeting of the board. The placard, signed *by order*, Mr. Swinyard said meant by his order : "The object of the placard was to make known to the employees the consequences that would follow if they committed the same irregularities, not punching or collecting tickets." Instructions were given to place the placards in the private offices of the employees. He also said, "It was my duty as General Manager to issue such notices as this." The two tickets now produced he believed to be two of the four that were in the envelope which came from the dead letter office.

*James McGrath* said he was instructed by Mr. Wallace of the superintendent's department, in the defendants' employ, to put up a copy of the circular in each station-master's office, and in each booking office, which is not part of the station master's office, also in each conductor's circular book : "that they were intended for the private information of employees only, and must on no account be allowed to be taken off the Company's premises." These were the instructions by letter, and the witness said he did what he was instructed to do : that at Lynden, Prairie Siding, and Lewisville the offices and station masters' rooms were public offices.

*Mr. Dawson* said the booking office was the ticket office, it was private. The conductor's book is in a private room. Mr. Dawson was the station master at Hamilton. He said the circular was in his office for his own information ; people came into his office when they wanted to see him ; one was in the ticket office ; it could not be seen from the wicket.

*Peter Neilson*, the station master at Clifton, said three of the placards were put up ; one in the ticket office, one in the station office, one in the conductor's office. They were up for some months. They were there for private

use. If a person outside had his attention drawn to it he might see it; others than employees might have seen it.

*Ralph Hall*, issuer of tickets at Clifton, said a placard was up in his office; remembered only one person seeing it who was not an employee. The door was open, and he came into the room. His room was marked, and was private, and few came in.

*Robert Orr*, station master at Grimsby, said a placard was up in my office. Few persons come into it; sometimes I ask a person to come in; it was so placed that it could not be seen from the outside.

*George Reed*, station master at Thorold, and *John McPhail*, station master at St. Catharines, spoke to the same effect of the placard at their stations.

*Mr. Lawder* said: I saw a placard in the general waiting room at St. Catharines. I saw it at Beamsville, at Grimsby. I think the station master pointed it out to me at Grimsby in the general waiting room, saw it in St. Catharines without difficulty; any person could see it; the same at Grimsby.

*Noah Clouts* said he saw it at Thorold.

At the close of the plaintiff's case, *J. H. Cameron*, Q. C., for the defendants, objected, 1. That there was no evidence to make the defendants liable for the publication: that it was necessary to prove by an order or resolution of the Company that the libel was authorized by them: 2. That even if it were, it was a privileged communication, and no express malice was shewn: that the facts stated in the placard were for the information of defendants' employees, and the instructions given to McGrath were justified; and 3. That the action was too late, as it should have been brought within six months, under 16 Vic. ch. 99, sec. 10. He contended, also, that the plea of justification was proved. Leave was reserved to move to enter a nonsuit on these grounds.

For the defence, Messrs. *McMaster*, *Carling*, and *Mr. McInnes*, directors of the defendants' line, said the board never gave any directions to issue the placard.



*G. Fay*, said : I sell tickets at Utica, United States, for passengers on defendants' line. The two tickets now shewn to me passed through my hands. They were sold after 11, a.m., on the 6th of October. Persons using these tickets could reach the bridge that night. I always stamp tickets: they bear my stamp. I sold the tickets at Utica. I know them by my office number and stamp. The hour is stamped for insurance companies. As the tickets were not punched, I cannot say if they were used. My station is 584 with the insurance company.

*Mr. Robb*, said the two tickets produced were, he believed, two of the tickets that were in the envelope he got from Mr. Swinyard.

*W. Muir*, said, there was nothing to shew on the face of the tickets they had been used.

The learned Judge told the jury that if they were satisfied Mr. Swinyard ordered the printing and posting up of the placards, they should assume it was done by the defendants, whether the board or the directors authorized him. As to privilege, that if the placard had been handed to the employees, or enclosed in an envelope for their own information, and as a warning of the consequences that would ensue to any of them who were parties to the irregularities referred to, it would have been privileged, but as the instructions were to put the notices up in the offices mentioned, they should say whether in giving these instructions Mr. Swinyard acted *bonâ fide*, and was uninfluenced by malicious or improper motives, or with a view to injure the plaintiff. If they thought he acted *bonâ fide*, to find for defendants, if otherwise, for the plaintiff.

As to the plea of justification, that he was of opinion the facts stated in it were proved, except the fact as to the tickets being used, and that if they were satisfied from all the circumstances that they had been used, they should find the issue for the defendants.

The counsel for defendants renewed the objections he had taken at the close of the plaintiff's evidence.

The jury found a verdict for the plaintiff on both issues, and damages \$200.

In Michaelmas Term last *J. H. Cameron*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a nonsuit be entered, on the leave reserved at the trial, on the ground that the hand-bill charged as a libel was on the facts stated a privileged communication, and should have been so held by the learned Judge at the trial, and that there were no facts proved which required that any question connected with the claim of the defendants that the communication was privileged in law, should be left to the jury.

In this term *Harrison*, Q. C., shewed cause. The defendants contend,

1. That the publication was made unauthorizedly by Mr. Swinyard.

2. That at all events it was a privileged communication, and

3. That the action was not brought within six months,

The last ground, if open to the defendants, is of no avail to them, as the matter is not within the Act. It is not a matter happening by reason of the railway : *Garton v. The Great Western R. W. Co.*, El. Bl. & El. 837; *McCallum v. Grand Trunk R. W. Co.*, 31 U. C. R. 527. The six months clause is contained in the 4 Wm. IV. ch. 29, but it has not been noted in the margin of the plea, although the 16 Vic. ch. 99, sec. 10, has been noted.

The publication was on the evidence the act of the defendants; Mr. Swinyard acted for them : *Limpus v. The London Omnibus Co.*, 1 H. & C. 526; *Walker v. The South Western R. W. Co.*, 21 L. T. N.S. 301; S. C. L. R. 2 Ex. 228; *Tebbutt v. The Bristol and Exeter R. W. Co.*, L. R. 6 Q. B. 73; *Philadelphia, &c., R. W. Co. v. Quigly*, 21 Howard 202, 212, 223; *Re Bonelli's Telegraph Co.*, L. R. 12 Eq. 246.

The remaining question is, whether the publication was privileged or not? It was put up in places where it was seen, and could be easily seen by others than the defendants' employees, and this was going beyond what the

privilege could justify: *Toogood v. Spyring*, 4 Tyr. 582; *Harrison v. Bush*, 5 E. & B. 344; *Whitley v. Adams*, 15 C. B. N. S. 392; *Fryer v. Kinnersley*, 15 C. B. N. S. 422; *Force v. Warren*, 15 C. B. N. S. 806; *Lawless v. The Anglo Egyptian Cotton and Oil Co.*, L. R. 4 Q. B. 262; 1 *Redfield on Railways*, 517.

*J. H. Cameron*, Q. C., supported the rule. This is a matter happening by reason of the railway, and is within the 16 Vic. ch. 99, sec. 10, which is noted in the margin of the plea: *Garton v. The Great Western R. W. Co.*, E. B. & E. 837, which was a case of money had and received. Although a corporate body may be liable for a libel published by its agent,—*Whitfield v. The South Eastern R. W. Co.*, E. B. & E. 115—there was no such agency on the part of Mr. Swinyard established here. The Omnibus case was decided on the ground that what the servant did was within the line of his duty and employment. The publication of a libel is not within the duty of the agent of a railway company. It is a criminal act, and cannot be ratified. The board never authorized the publication; nor did the directors do so individually: *Eggington v. The Mayor, &c., of Lichfield*, 5 E. & B. 100; *Green v. The London General Omnibus Co.*, 7 C. B. N. S. 290; *Allen v. The London, &c., R. W. Co.*, L. R. 6 Q. B. 65; *Stevens v. The Midland Ry. Co. et al.* 23 L. J. Ex. 328; *Brook v. Hook*, L. R. 6 Ex. 89.

This communication was, however, privileged. It was made in a railway matter affecting the Company and all the employees, and it was right it should be communicated to the employees: *Alexander v. North*, 6 B. & S. 340; *Biggs v. The Great Eastern R. W. Co.*, 16 W. R. 908; S. C. 18 L. T. N. S. 482; *Gwynn v. The South East R. W. Co.* 18 L. T. N. S. 738.

WILSON, J.—The publication was made in April, 1869, and the action was not brought till August, 1871.

The defendants say that as the action has not been brought within the six months limited by the 16 Vic. ch.

99, sec. 10, the verdict cannot be sustained. The clause provides "That all suits for indemnity for any damage or injury sustained by any person or persons whomsoever by reason of the said railway, shall be instituted within six calendar months next after the time of such supposed damage sustained." It is the same provision as that contained in the Railway Clauses Consolidation Act: Consol. Stat. C. ch. 66, sec. 83, and upon which *McCallum v. The Grand Trunk R. W. Co.*, 31 U. C. R. 527, was decided.

In *Garton v. The Great Western R. W. Co.*, E. B. & E. 837, 846, the Company pleaded the want of a notice of action a month before the action was brought, which was for money had and received. The judgment was reversed in Error, because such an action was not necessarily in respect of "anything done in pursuance of this Act, or in the execution of the powers or any of the orders made, given, or directed in, by or under this Act," and that there should have been an allegation in the plea that the action was brought for something done or omitted, &c., so as to bring the case expressly within the terms of the statute.

Here the question under the general issue by statute arises on the evidence, and not on the pleadings.

I do not say it is impossible that a libellous publication may not be made, and the limitation of the statute apply to the action because the publication was by reason of the railway. But it is enough to say that in this action no such facts appear. The publication was certainly made by the Company, because they were railway proprietors, and about a railway matter, because it related to their business, and of the plaintiff, because he was in their railway service. Yet it was not a publication made by reason of the railway, but because they were exercising their ordinary civil rights in removing a person they considered to be an unjust servant from their employment, and in informing their numerous employees over their line that they had so removed him, and of the cause of that removal.

It is no more a matter which was done by reason of the railway, than the keeping of a banker's account is by



reason of the railway. The plaintiff did not sustain his injury by reason of the railway, but by reason of the publication of the hand-bill complained of.

I may say I entertain no doubt on this point.

Then as to the publication: the evidence shews it was done by the general manager of the line in the ordinary performance of his duties: *Limpus v. The London General Omnibus Co.*, 1 H. & C. 526; *Green v. The same Co.*, 7 C.B.N. S. 290, and *Walker v. The Great Western R. W. Co.*, L. R. 2 Ex. 228, S. C. 21 L. T. N. S. 301, are authorities for that purpose. The question of ratification by the Company does not arise, because the Company were the principals.

The libel, although indictable, is not a criminal matter properly, not more so than an assault is, which may also be the subject of an indictment.

That forgery could not be ratified: *Brook v. Hook*, L. R. 6 Ex. 89; or that the agent went beyond the positive duty he had to perform, and so did not make the corporation liable: *Eggington v. Mayor, &c., of Lichfield and others*, 5 E. & B. 100; or because the clerk of a company did an act not binding on his employers: *Allen v. The London, &c., R. W. Co.*, L. R. 6 Q. B. 65, are not reasons why the defendants should not be liable for the libel if they authorized it to be published. And it is admitted that it is good law that a corporation may be sued for defamation.

The Company, apart from any defect or mis-statement in the hand-bill, and of the mode in which they dealt with it, had unquestionably the right to publish the article they did. It related to a matter in which they were specially interested, and it was to and from those who were also interested in the subject.

It was a communication to the employees of the Company that the plaintiff, who had long been in their service, was removed from it; and that he had been removed for the cause which was assigned. Both of these were material for the employees of the Company to know, and to know promptly. *Lawless v. The Anglo Egyptian Cotton and Oil Co.*, L. R. 4 Q. B. 262; *Toogood v. Spyring*, 4 Tyr.

582; *Harrison v. Bush*, 5 E. & B. 344, and the many other cases that were cited, fully express the law on this point.

The defendants rely on the fact of the hand-bill being true, and so a justification; and, secondly, that it was a privileged communication.

*Biggs v. The Great Eastern R. W. Co.*, 16 W. R. 908, S. C., 18 L. T. N. S. 482; *Gwynn v. The South Eastern R. W. Co.*, 18 L. T. N. S. 738, and *Alexander v. The North Eastern R. W. Co.*, 6 B. & S. 340, are all cases of publication of the like nature, and which were good pleas, because asserting the publication to be true.

The hand-bill here asserts that the tickets "had been previously used," but not cancelled. That statement was not positively proved, but in my opinion the evidence was of that nature that it left no reasonable doubt that the tickets had been used; but the rule has not been moved on that ground, and the statement therefore stands as found to be untrue. It was not a mere narration of facts, but the representation of a fact which could not be substantiated, and in an important particular. Still it was for the jury to say whether the publication, though not literally true, was or was not substantially true, and if they thought the variance not material they might have found in favour of the defendants: *Alexander v. The North Eastern R. W. Co.*, 6 B. & S. 340, S. C., 12 Jur. N. S. 619.

But, as before mentioned, there is no motion on this part of the case.

The only remaining question is, whether this was or was not a privileged communication.

It undoubtedly was so in the subject and substance of the communication, and I think it did not lose the privilege by the mode of its publication in the private offices of the Company, where none but their employees had any right to be.

But there is evidence that it was put up in some of the offices and stations of the Company, so that anybody could see it. That cannot be justified.

The Company could print the matter contained in the hand-bills and distribute the bills among their employees : *Stockdale v. Hansard*, 9 A. & E. 1 ; *Lawless v. The Anglo Egyptian Cotton and Oil Co.*, L. R. 4 Q. B. 262, before referred to. And if the employees chose to put up or to distribute the bills to others, the Company would not have been liable. But here the Company, by their own immediate authorized officers, put up the bills in the places which were spoken of as being public, and so that anybody could see them, and *that* they were not justified in doing. That is conduct which displaces the privilege, and re-establishes the charge of malice.

Strong and unwarranted language or communications made to strangers may be causes for the loss of the privilege : *Fryer v. Kinnersley*, 15 C. B. N. S. 422 ; *Force v. Warren*, 15 C. B. N. S. 806 ; *Toogood v. Spyring*, 4 Tyr. 582 ; but intemperance of language will go for nothing if malice be disproved, as the excess is merely evidence of malice : *Cowles v. Potts*, 11 Jur. N. S. 949.

There is much in this case very strongly in favour of the defendants, but on the rule as issued we feel obliged to discharge it.

MORRISON, J., concurred.

*Rule discharged.*

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#### TENCH V. SWINYARD.

This rule, which was to abide the same result, was also discharged.

*Rule discharged.*

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## BRADLEY V. BROWN AND STREET.

*Obligation to keep roads in repair at intersection with cross roads—Contributory negligence.*

An action against defendants as owners of a macadamized road, which it was alleged they allowed to get out of repair at its point of intersection with another road, whereby the plaintiff was thrown out of his waggon, and broke his leg, &c. It appeared that the plaintiff was driving a high load of empty barrels, in a rack unfastened to the waggon, and that on coming to this spot, where the road was lower on one side than the other by 18 inches, so as to carry on the incline of a cross road, and which had deeper ruts on the lower side than on the higher, the plaintiff got on the high side of the load to steady it; the load upset, and the plaintiff was thrown down and broke his leg. Several questions were submitted to the jury, and in answer to (1) whether the injury to plaintiff happened in consequence of any defect in the road, they answered "by getting into a rut, and by the slant in the road." They also declared (2) that the accident did not happen in consequence of the height of the load or of the wind; (3), that it was not prudent for the plaintiff to have driven over the spot in question on the top of the load; (4), that the plaintiff, sitting as he did, contributed to the causing of the accident; (5), that it was imprudent not to fasten the rack, and the omission to do so contributed to the accident; (6), that the defendants could not have remedied the defect in the road without going beyond the limits of their road; but (7), that they might by going on the cross road have remedied at a reasonable outlay the defect in their road.

*Held*, that the answers of the jury to the first, second, sixth, and seventh questions amounted to a finding that defendants' road was out of repair, and dangerous to the public: that the answers to the third and fourth questions, though shewing some negligence on the plaintiff's part, did not amount to a finding of contributory negligence, so as to prevent his recovery; but that the answer to the fifth question was a finding of contributory negligence, which would bar the action.

*Held*, also, that it is the duty of the owners of a road to keep it in repair at its point of intersection with cross roads, even although such repairs may interfere with the use of the cross road.

THE declaration stated, that the defendants were the owners of a macadamized road leading from the Town of St. Catharines, in the County of Lincoln, to the Town of Clifton, in the County of Welland, on which tolls were levied and collected by the defendants; and it became and was the duty of the defendants, as such owners, to keep and maintain the road at all times in a fit, proper, and reasonable state of repair, &c. That the defendants allowed the road to get out of repair and become unsafe, at that part of the road in the village of Thorold where it is inter-



sected by a public road or highway, leading from the village of St. Davids to the village of Thorold; whereby the plaintiff, who was driving two horses and a waggon along the said road, was thrown out of the waggon, and had his leg broken, &c.

Pleas, 1. Not guilty. 2. That it was not the defendants' duty to keep the road in a fit, proper, and reasonable state of repair, for persons journeying over the same. 3. Defendants did not allow said portion of road to be out of repair and become unsafe. 4. Plaintiff was not thrown out of the waggon, nor had he his leg broken, in consequence of the said portion of the road being out of repair and unsafe.

Issue.

The cause was tried at the Welland Assizes, held before Gwynne, J., last spring.

The plaintiff, who was a witness on his own behalf, said: "I was a teamster on the canal. When navigation opens I attend the bridge. On the tenth of February, 1871, I was hauling a load of empty barrels from Thorold to St. Catharines. At a place on the road near Keefer's bridge, sloping down to the bridge, the road is narrow; two teams cannot pass. The roads were then all bad, and this place was very bad. One rut in the road was much deeper than another. The road was badly cut up. The ground was pretty hard frozen. The outside rut was not on the stone. When I came to the spot, knowing it was dangerous, I was going to get out and walk; but I stayed on the load, on reflection, in the hope of steadying it by my sitting on the high side. I drove near the canal, so as to straddle the ruts. When I came to where the road sloped so much on one side, the waggon slipped down into the lower rut, and upset me and the load and the rack (in which the empty barrels were piled). I fell down a hill on the side of the road. I found my leg was broken, and I sat there till John O'Brien came along. I was driving with all the care I could. When I fell, I hallooed to the horses, and they stopped and never stirred. I had a common lumber waggon, with an ordinary rack. The barrels were carefully loaded. The rack

was not tied to the waggon. A load of empty barrels is a top-heavy load, not more so than a load of hay or straw. It was not the wind that blew me over; it was blowing fresh. I was about six weeks confined to the house. I did not commence to do anything until September. I was going on crutches till the latter end of August. In September I was not able to load or unload my team. I found I was unfit for teaming, so I sold my horses. I could make, on an average, \$3 a day all the year round. I get now, as bridge tender, during the navigation \$25 a month, for eight or nine months. I am now thirty-two years of age, and have been a teamster all my life. I used to get from one-fourth of a cent to one-half a cent more than other teamsters (on each barrel he hauled). I paid a man \$20 a month and gave him his board, to attend to my team while I was laid up. I was protected from the wind by the mountain where the accident happened. A few loads of stone, raising the east side of the road, would have remedied the defect; the road could be widened; there is nothing to hinder it. I always pay tolls on the road.

On cross-examination, he said: I always teamed on this road, and never met with an accident before. I broke a few barrels once in a while. I wish I had got off the load; but I thought my weight would steady it, so as to get over this place. I had 136 barrels on the waggon. I always took that number. I went very slow. The wind was not unusually high; it was not the height of the wind which gave me the apprehension of danger at this place. The breadth of my rack was three feet five inches at the bottom, and at the top seven or eight feet; the length was twenty-four feet. The waggon did not upset; if the rack had been tied to it, I think it would have upset.

*Edward Gardiner*, a Provincial Land Surveyor, explained the state of the roads where the accident occurred. He said, the roadway of defendants was twelve feet wide there. The descent, down the St. David's road, was very steep; if, defendants levelled their road, across from the bridge, that would make the St. David's road impracticable, unless the

raising were continued down the St. David's road. The St. David's road is an embankment there, up to the bridge. The bridge is raised considerably above the stone road; consequently, the west side of the macadamized road is necessarily higher, than the other side. To connect the St. David's road with the bridge, it is necessary to leave the slope which exists in the macadamized road. To rectify that, the St. David's road embankment would have to be raised nearly its whole extent. The St. David's road at this place is a street in the village of Thorold. From the bridge to the foot of the hill on the St. David's road is about 356 feet. The St. David's road should be raised for a distance of 150 feet. A westerly wind would blow, across the bridge, directly down the St. David's road at this place. It is only within the width of the St. David's road, that the inequality between the wheel ruts exists, that the slope exists. North and south of the St. David's road, the macadamized road is level. The road, west of the canal, 500 feet west of the stone road, is 32 feet higher than the stone road. The road still ascends going west. The macadamized road is 30 feet above the foot of the hill on the St. David's road. The wind would come from the west, through the cut across the canal, strongly. The macadamized road could not be levelled, without raising the St. David's road. \$300 or \$400 would do the work. To make the macadamized road level, it would have to be raised 18 inches on the east side.

*Jacob A. Ball*, said: It was the steep approach to the bridge which made the macadamized road dangerous.

The road was proved to belong to the defendants.

Several witnesses besides were called by the plaintiff, who did not add to the evidence before stated. Two or three of them spoke of accidents which happened to them, or which nearly happened to them, on the St. David's road, going from the bridge across the macadamized road.

For the defence, *C. Howell*, said: The government, about four years ago, raised the canal bridge from nine to twelve inches, and the government, to make the approach,



raised the west side of the stone road, and that increased the slope of the stone road. Witness measured the elevation of the road last week, between the wheel tracks ; it was from five and a half to six inches where the front wheels were, the east wheel was two and a half inches lower than the west wheel ; between the hind wheels, the difference was between five and six inches.

*Alexander Semple* : Saw the accident. If the rack had been fastened to the waggon, he did not think the load would have upset. His impression was, the wind caused the accident.

Several witnesses were examined for the defendants, and among them the defendant Brown. They gave strong evidence of there having been a high wind on that day, and that it was the wind that most likely caused the accident. And, that the levelling of the stone road, would make the use of the St. David's road impracticable, unless at a heavy outlay ; and that the government, by raising the bridge and the west side of the stone road, made the passage there worse than it had been.

The learned Judge, then, left the following questions to the jury, which they answered.

1. Did the injury to the plaintiff happen in consequence of any, and if any, what defect in the defendants' road, or from some other cause ?

Answer. By getting into rut, was caused by slant of the road.

2. Did or not the accident happen, in consequence of the height of the load, or of the wind, or from some other cause ?

Answer. No.

3. Having regard to the known condition of the road at the place in question, was it or not prudent in the plaintiff to have driven past the place where the accident happened, sitting on the top of the load.

Answer. Not prudent.

4. Did the plaintiff sitting on the top of the load, contribute to the causing of the accident ?



Answer. Yes.

5. Was it, or not, imprudent not to have had the rack fastened to the waggon, and did the omission to do so contribute to the accident?

Answer. Yes.

6. Could the defendants within the limits of their own road, and without raising the St. David's road, (outside the limits of the defendants' road), have remedied the defect in the road, if any such caused the accident?

Answer. No.

7. Could they, by a reasonable outlay, have remedied such defect, if any there was, by raising the St. David's road?

Answer. Yes.

The learned Judge noted, that he should have entered the verdict for the defendants on these answers, only that the jury, before handing in the answers, gave their verdict for the plaintiff, and \$300 damages. And it had been agreed, before the jury went out, if they found for the plaintiff, it should be subject to leave reserved to defendants to move to enter it for them, according as the Court should be of opinion it should be entered, having regard to the answers of the jury to the questions.

In this term *McMichael*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside, and a verdict entered for the defendants, on the leave reserved.

*Harrison*, Q. C., also obtained a rule, calling on the defendants to shew cause, why a new trial should not be had, in consequence of the smallness of the damages rendered for the plaintiff, and on the affidavits filed.

The two affidavits stated, that since the trial the road had been repaired, and the cost did not exceed, it was believed, more than \$50.

*Harrison*, Q. C., supported the plaintiff's rule, and shewed cause to the defendant's rule.

The statute, under which the defendants hold the road,

is the Consol. Stat. U. C. ch. 49. Sections 62, 68, 84, and some of those following are principally to be considered.

The defendants, as owners of the road, and receiving tolls for the use of it, are bound to maintain it, and are liable for the consequences of their default: *Regina v. The Town of Paris*, 12 C. P. 445; *Regina v. Brown et al.*, 13 C. P. 356; *Totten v. Halligan*, 13 C. P. 567; *Regina v. The Corporation of Louth*, 13 C. P. 615; *The St. Catharines, &c., Road Co. v. Gardner*, 20 C. P. 107; S. C. affirmed in appeal, 21 C. P. 190; *Caswell v. St. Marys, &c., Road Co.*, 28 U. C. R. 247; *Macdonald v. The Hamilton, &c., Road Co.*, 3 C. P. 402.

It is no excuse to the defendants, that the St. Davids' road crosses their road: *Regina v. The Woodstock, &c., Road Co.*, 18 U. C. R. 49. And they are bound to repair it without regard to the effect that their work on their own road would have on the St. Davids' road.

Then the answer of the jury to the fourth question, that the plaintiff sitting on the load, contributed to the causing of the accident, is not sufficient of itself. It should have been, that the plaintiff so far contributed that but for his contribution the accident would not have happened: *Dowell v. The General Steam Navigation Co.*, 5 E. & B. 195; *Tuff v. Warman*, 2 C. B. N. S. 740; *Greenland v. Chaplin*, 5 Ex. 243.

The finding is against evidence. The jury were very much influenced by the fact that the rack was not fastened to the waggon, while it was shewn that it was never customary to secure the rack to the waggon.

The fact that the plaintiff was on the load at the high side was a precaution he took, to counteract the chance of an accident.

The plaintiff is entitled, at any rate, to a new trial; for, he was idle more than six months, during which time he could have earned \$3 a day; and he was besides put to very large expenses while he was laid up, and was obliged, at last, to sell his team. The sum of \$300 is no compensation whatever in such a case.

*McMichael*, Q. C., supported the defendants' rule, and shewed cause to the plaintiff's rule.

The defendants are not answerable for the state of the road at the particular place in question, because the government raised the bridge over the canal, and raised the approach to the bridge, as far as from the west side of the defendants' road just to where the accident happened. The St. David's road, to the bridge, is a steep ascent. The defendant's road crosses that road, and must conform to the slant of it. The change made by the government gave to the defendants' road a greater fall to the east.

If the defendants had levelled their own road, they would have made the other road impassable; and to have adapted the other road to their own altered road, would have required a large expenditure by the defendants, which they were not called upon to make. Besides, the defendants had no power to go upon the St. David's road, and do such work upon it.

The case of *Regina v. The Woodstock, &c., Road Co*, 18 U. C. R. 49, does not apply, for the defendants' road, in that case, did not cross the other road. The defendants, too, were bound to have their road so as not to injure the St. David's road.

The contribution by the plaintiff to the accident was a direct act on his part, which disentitles him to any claim for damages: *Dowell v. The General Steam Navigation Co.*, 5 E. & B. 95. He referred, also, to *Caledonian R. W. Co. v. Ogilvy*, 2 Macq. Sc. App., 229; *Duncan v. Findlater*, 6 Cl. & Fin. 894, 908.

As to the damages, it cannot be said, if the plaintiff were entitled to any, that they were too small. The jury may have taken into account the imprudence of the plaintiff's conduct, and the difficulty the defendants were placed in by reason of the acts of the government, and the necessity they were under to keep their road adapted to the level upon the St. David's road.

WILSON, J.—The jury did not find that the road was out of repair, or dangerous. They found the injury to the plaintiff happened by the waggon wheels getting into a rut, and by the slant of the road, and not in consequence of the height of the load, all of which is not inconsistent with the road being in repair, and not dangerous.

The issue was, whether the defendants had allowed their road to get out of repair, and had not repaired it.

The rut into which the wheels of the plaintiff's waggon got, may or may not have been of a character to make it dangerous; or, if it were dangerous, the defendants may or may not have allowed it to remain in the road: that is, they may or may not have known of it. It may not have been there for an hour before the plaintiff passed, and the defendants may never have heard of it; or, if they were aware of it, they may not have had the opportunity to repair it.

The learned Judge who tried the cause is of opinion the jury meant by their answers to find the road was out of repair, and was allowed to be out of repair by the defendants, by reason of the rut in the road into which the wheels got, and by reason of the slant of the road at that particular place. They distinctly found the accident was not occasioned by the height of the load.

The jury find, as it were, a special verdict as to the slant of the road, from their answers to the sixth and seventh questions. They have said the accident was caused by the slant of the road, which slant the defendants could not, within the limits of their own road, and without raising the St. David's road, have remedied; but they could by a reasonable outlay have remedied the defect by raising the David's road.

We know what the jury meant, but they have certainly not in express language found it. They did not mean to say, as their words read, that the defendants could not remedy the slant of their road unless by raising the St. David's road. What they meant was, that the defendants could not remedy the slant of their road, without injuring or preventing the travel on the St. David's road across the defendants' road; but, that they could remedy the slant



if they also raised the St. David's road, to meet the altered condition of their own road.

If it can be said the jury have found that leaving or permitting the slant of the road to remain, was allowing the road to be out of repair, if it were the defendants' duty and if they had the power to remedy it, without regard to the effect which the amendment would have upon the transverse road; but that the permitting the slant to remain was not allowing the road to be out of repair, if the defendants had not the power to remedy it by altering the transverse road, or otherwise, so as not to prejudice the cross travel; then there has been a good special finding.

It is not very easy to say this is what has been done, and more particularly when the slant is not the only imperfection found, but the accident is attributed as well to the rut as to the slant.

Looking at the finding generally, I think it may be taken, that the jury have found the accident happened, not by the height of the load, that is, not by the act of the plaintiff, (unless so far as contributory negligence can be imputed, and to which I am not now alluding), but by reason of the rut and slant in the road, that is, by a defect of the road; and that the defendants are answerable for it, if they could alter the St. David's road to adapt it to the changes they made in their own road, but otherwise not.

This latter part must be amplified to read in this way—that the jury find the defendants are liable if they had the power, or if it were their duty, to remedy the defect in their road by altering it without regard to the effect such alteration would have upon the transverse road; or if they had the power, and it was their duty, to alter the St. David's road to adapt it to the amendment of their own road.

The case has been argued as if the finding had been full enough to found a judgment upon, and the parties at the trial were satisfied with it. The learned Judge also is of opinion the finding meets the facts of the case. We may therefore, without remitting the cause for a more precise finding, assume we have all the material findings before us, and dispose of the case as it has been argued by the parties.

The facts, as we understand them, are that the defendants' road which is at this part on a line from north to south, crosses the St. David's road on a slope to the east. The St. Davids' road, which is at this part on a line from east to west, ascends from a point east of the defendants' road to the canal bridge on the west of the defendants' road, a length altogether of 356 feet. The west side of the defendants' road is 18 inches higher than the east side of it where it intersects the St. David's road. It is, at present, adapted at that part to the grade of the St. David's road, and no change can be made, in its level, without making a corresponding change upon the other road; if the one road is to be adapted to the other road for use.

At the time of the accident, the off or east fore-wheel of the plaintiff's waggon was two and a-half inches lower than the nigh or west fore-wheel; and the off or east hind-wheel was five and a-half or six inches lower than the nigh or west hind-wheel. A difference to that extent would be of very little concern on an ordinary level road; but on a slanting road, on which, as I understand the plan and evidence, there is a fall in the width of the road of 18 inches in 18 feet, or one inch in twelve, it is of course more serious.

The defendants were bound to have their road in repair, at all seasons of the year, subject to natural and inevitable causes.

The roads were bad at the time of the accident. The weather had been mild, and the roads were cut into ruts. On the day of the accident, the roads were harder than they had been. The plaintiff was driving a dangerous kind of load, probably about nine feet high, though the witnesses do not name the height, and overhanging at the top, about a foot or eighteen inches over each wheel on the level. When one wheel was sunk six inches, in a rut, the top of the load on that side would, one may conjecture, be thrown about eleven or twelve inches more off the centre.

The difficulty, at this particular part, is caused by the junction of the two roads each on a different grade.

The St. David's road, at this part, is a road in the village of Thorold ; and, under the Consol. Stat. U. C., ch. 49, sec. 6, the defendants' road could have been formed there only by the leave of the municipality : see, also, secs. 10, 11.

In *Regina v. Brown et al.*, 13 C. P. 356, it was held the present road of the defendants, which passed through the village of Thorold, was by the Joint Stock Companies' Act, vested in the defendants, and not in the municipality. See Consol. Stat. U. C. ch. 49, sec. 70.

*The St. Catharines, &c., Road Co., v. Gardner*, 20 C. P. 107, affirmed in appeal, 21 C. P. 190, confirms the decision in *Regina v. Brown et al.*, 13 C. P. 356.

The company must conform to the directions of the municipality in the original construction of their road : secs. 10, 11 ; and the grades of their roads must not be more than one in twenty, unless with the special sanction of the county engineer, sec. 8.

In *Regina v. The Woodstock, &c., Road Co.*, 18 U. C. R. 49, which was somewhat similar to the present case, the defendants were indicted for obstructing a highway, called Raglan Street, which came to, but did not cross, the defendants' road. The defendants were a company, incorporated under the Joint Stock Companies Act, and the road they acquired was the town line between East and West Oxford. Teams used to pass from Raglan Street to the town line before the company acquired the road ; but after that, by reason of the defendants lowering the level of the road, teams could no longer pass from Raglan Street to the town line.

Sir John Robinson said : " The defendants had power by Act of Parliament to make their own road along the town line ; and they were not only authorized, but required, by law to make it according to a certain grade, which obliged them to lower the bed of it as they did. We see nothing in any statute which made it incumbent on them to grade any cross roads or streets which lead into their road, so as to prevent inconvenience in approaching it from such cross roads. \* \* \* " We see no provision against interfering

with cross roads or streets in carrying on improvements, nor any provision to meet such a case.

“These defendants had no right, and were not obliged, to enter upon Raglan Street, and to begin far back upon that street to alter its level, so as to construct a gradual approach to the town line. That must be left, for anything we can see, to the proper municipal authorities having control over that street, or to those interested in being able to get out of it on the defendants’ road.”

The Chief Justice also said, “If the cross road, or street, had crossed the town line and gone beyond it, a different question would be presented.” -

Under the Municipal Act, roads and streets may be raised or lowered if necessary, without regard to the manner that individual proprietors or householders may be affected by the change : *Reid v. The Corporation of Hamilton*, 5 C. P. 269, 281.

Can such municipalities so grade and level the roads, within their limits, however they may affect the roads of other municipalities crossing or leading to them ?

I presume they can. And in the case of such other municipalities, or bodies or persons beyond the limit of the municipality which made the changes, there would be no compensation. The same rule would apply under the Joint Stock Companies Act.

All powers granted to them they would be at liberty to exercise, if properly acted upon in the fair performance of their work, although they might prejudicially affect the rights of other persons or bodies.

Here the defendants’ road, as I am accepting the finding of the jury, was not in repair at the time of the accident. They can repair it, but it will be to the prejudice of the St. David’s road. I think they are bound to repair their road, and to make it safe for the public, although their reparation should prejudice the St. David’s road.

That the defendants cannot adapt the St. David’s road, by raising or otherwise altering it so as to meet the



altered condition of their own road, is no reason why they should not repair their own road, without regard to the St. David's road.

I do not think the defendants are bound to keep their road at this part level, from west to east ; they may have it on an incline, suitable to the other road, so long as their own line of road is safe for the public. The defendants contend that such an incline they had ; but the finding of the jury must be taken against them, although, as before explained, not perfectly, explicitly, or satisfactorily found.

I do not think, either, that the defendants would be at liberty wantonly to alter the level of their road, to the prejudice of the public using other roads leading to or crossing this one.

They would be obliged, so far as it was necessary and practicable, to use and manage their own road so as to do as little damage to the public using other roads connected with it as possible.

There are many instances of conflicting rights ; and an absolute proprietor is not at liberty to use his property but in a qualified manner, subject to the rights and interests of others.

I think the verdict must be for the plaintiff on this part of the case : that is, that the road was out of repair, and dangerous to the public ; which disposes of the answers to the first and second questions.

The third finding was, that it was not prudent of the plaintiff, having regard to the known condition of the road, to have been on top of the load, at the place where the accident happened.

I do not see that the finding is very material. It may, or may not, have been prudent of the plaintiff to have been where he was at the time of the accident. He was justified on the evidence in prosecuting his right of travel. The case for the defence was, that the road was not dangerous, but passable. He would have been justified in using the road, although he knew there was some degree of danger in doing so. The amount of danger, and the circumstances

which led the plaintiff to incur the danger, were for the jury to determine. If the plaintiff did not run upon a great and obvious peril, and if he could not have escaped from harm by ordinary care on his part, he is entitled to recover if the road were out of repair, and were the cause of the accident: *Clayards v. Dethick*, 12 Q. B. 439.

If the defendants were to blame for the upsetting of the load, and if the load would equally have upset whether the plaintiff were on it or not, they are answerable for the injury he sustained, although he should not, in prudence, have been upon the load at that place: *Greenland v. Chaplin*, 5 Ex. 243. It is not pretended he was there for the purpose of being injured, or of enhancing his danger. There is nothing in the third finding to prejudice the plaintiff.

The fourth question was, "Did the plaintiff, sitting on the top of the load, contribute to the causing of the accident? Which the jury answered in the affirmative.

The third finding must be considered as of importance on this answer. From the two together, they have found, that it was not prudent of the plaintiff to have been on the top of his load at the place of the accident and by his being there he contributed to the causing of the accident.

If the jury had found, that the being on the top of the load was negligence, and that but for *such* negligence the accident would not have happened, they would have shewn that the plaintiff contributed to the causing of the accident. Here they find the result of his own misfeasance or negligence, by finding that he contributed to his own injury, without shewing the grounds, or very sufficient grounds, of contribution.

One who contributes to his own injury must, however, be presumed to be disqualified from recovering; for contribution is that degree of participation which supposes that, but for the participation referred to, the accident would not have happened.

Wightman, J., in *Tuff v. Warman*, 5 C. B. N. S. 581, says, "If by the exercise of ordinary care the plaintiff

might have prevented the injury, he contributes to it, and therefore cannot recover."

If the question had been put in the form in which it is stated in the same case, p. 585, "Whether the plaintiff himself so far contributed to the misfortune by his own negligence, or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened," the answer, taking in all the details which constitute contribution, would have been conclusive one way or the other.

But we must assume the learned Judge explained to the jury what *contribution* was; and if so, the finding is as complete as if the question had been put in its fullest form, if the jury have confined themselves to the proper ground of accident, instead of the consequential injury arising from it.

The reason I have a doubt on this point is, that the jury may have thought that the words in the question put to them, "contribute to the causing of *the accident*," applied to the personal injury sustained by the plaintiff, by having his leg broken, and which they might attribute to his being on the top of the load.

What was the accident? It was the oversetting of the load. The loss of or injury done to the barrels, or to the waggon, or horses, or to the plaintiff, was, or would be, the consequence of the accident. The jury may have thought that the load would have been pitched over, whether the plaintiff had been on the top of it or not; but they may have thought the breaking of the plaintiff's leg was the accident, and that *that accident* would not have happened if he had not been on the load; and because he was there, he contributed to it.

I do not understand how the plaintiff could possibly have contributed to the turning over of the load, while he was sitting "on the high side of it," for the purpose of steadying it.

The defendants cannot excuse themselves for the defi-

ciency of their road, or relieve themselves from the consequences of that deficiency, by the upsetting of the plaintiff's load, merely because the plaintiff was sitting at the time where it was not prudent for him to be, or where he had no business to be. If he did not contribute to the upsetting of his load, he is entitled to recover, as has been before stated.

If the accident did not happen by reason of the height of the load, which the jury have found, and if the plaintiff being on the high side of the load could not have helped to upset it, although the jury have found it, (that is, if *that* be what they did find, although I have a doubt of it), then the finding on the question is either a mistaken one, by attributing the accident to the wrong event; or it is an erroneous one, because the true accident could not have happened, in any way, from such a cause.

On this finding the verdict for the plaintiff should not be interfered with.

The fifth question, "Was it, or not, imprudent not to have had the rack fastened to the waggon, and did the omission to do so contribute to the accident?" and which the jury found in the affirmative, has now to be considered. It is, I think, free from the difficulties of the previous question.

Whether the *accident* was considered to have been the breaking of the plaintiff's leg, or the overturning of the load, is here all the one point.

The plaintiff's leg was broken by reason of the load going over, and the load went over, as the jury say, because the rack was not fastened to the waggon. That appears to me to be a finding for the defendants; a contributing to the accident by the plaintiff, as before explained, which is a bar to the action.

The sixth and seventh questions are of no separate importance; they apply to the first and second questions, and in that respect they have been already considered.

The result is, that the verdict should be entered for the



plaintiff on the second and third issues, and for the defendants on the first and fourth issues.

MORRISON, J., concurred.

*Rule accordingly.*

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THOMAS GORDON, Receiver in a suit in Chancery of Morphy  
v. Feehan et al, v. MCPHAIL.

*Lost deed—Secondary evidence—Proof of search—Vesting order in Chancery.*

The plaintiff in ejectment claimed under a mortgage from C. to O., executed in 1856. C. being called proved his execution of such a mortgage, and the memorial of it signed by him was produced from the Registry Office. He had last seen the mortgage with O., the mortgagee, in 1857. O. in 1859 became insolvent, and made an assignment of all his estate to F. He absconded to the U. S. shortly after, and was followed by F. It was not shewn that F. had ever had the mortgage, though the land was assigned to him; and it appeared that in a suit against him and O., in Chancery, on behalf of the creditors, commenced many years after the assignment, and which resulted in the appointment of the plaintiff as receiver, F. produced the papers in the suit under an order of the Court, and this mortgage was not among them. A search was proved to have been made in the Master's office, with the plaintiff's solicitor in that suit, and among the Receiver's papers, but not with O., who was still living in Michigan, nor with his solicitor in the suit.

*Held*, that the proof of search was sufficient to let in the secondary evidence, for under the circumstances there was no presumption that O. retained the mortgage or took it to the United States with him.

*Held*, also, that a vesting order made in the Chancery suit, vesting all the estate of O., including this land, in the plaintiff, was sufficient proof of plaintiff's title, without shewing why it was made.

EJECTMENT for the south half of lot 2, in the 8th concession of the township of Sombra.

The cause was tried before Gwynne, J., at the last Fall Assizes at Sarnia, without a jury.

The facts were as follow :—

The plaintiff claimed under a mortgage executed by one James Connell to Peter J. O'Neill, dated 26th May, 1856, which O'Neill assigned with other property to Feehan, in trust for creditors, on the 12th September, 1859; and under an order of Chancery dated the 23rd of July, 1869, made in a suit still pending in that Court, wherein the

said Morphy was plaintiff, and Feehan and others were defendants, vesting all the estate and interest of the defendants in that suit in Gordon, the plaintiff in this suit.

The defendant denied the plaintiff's title, and asserted title by twenty years adverse possession by himself and in others under whom he claimed.

*James Connell* said he gave the mortgage referred to to O'Neill for goods, and it was not paid: that he saw it afterwards either in O'Neill's possession or in that of his attorney, Alexander Cameron: that was within a year after he gave the mortgage, and before O'Neill became insolvent; it was at O'Neill's office. The witness said he had written the mortgage himself, and O'Neill shewed it to Mr. Cameron and asked him if it was all correct. The current report, he said, for many years, had been that both O'Neill and Feehan absconded. O'Neill was in Michigan, U. S. Feehan was in the United States somewhere, as the witness believed. He absconded shortly after O'Neill did, as witness also believed.

*John Winchester* said: In the Chancery suit of *Morphy v. Feehan* and others, the mortgage referred to was an asset in that suit. He said: I have searched in the Master's office at Toronto, among the papers filed there in that suit, and produced by Feehan under an order in the suit. The mortgage did not appear to be scheduled as one of the documents produced by Feehan. I don't know of my own knowledge who was attorney for O'Neill in that suit. I enquired of Mr. Cameron, of Cameron and Holmested, for the deed, about six months ago. He told me to search with Mr. Holmested among certain papers which he pointed out in the safe. I did not find it among these papers. O'Neill absconded after he became insolvent. I have searched among the papers produced by Feehan in Chancery, and delivered over to Gordon as Receiver; I did not find it among those papers. I have also searched among Mr. Strong's papers, who was solicitor of defendant Feehan in that suit. I also searched among the Receiver's papers. Mr. Morphy is solicitor of the Receiver. Feehan

has absconded also, and I have heard he is dead; I don't know how long it is since he left the country, it is over six years.

In cross-examination he said: Have been in Mr. Morphy's office since the first of March, 1866. I only know of Feehan having absconded by general report. I don't know where O'Neill is.

The vesting order was put in, and a final order of foreclosure in the suit of *Gordon v. Connell*, dated the third of October, 1870, was also put in. The premises were not mentioned in it.

The learned Judge received secondary evidence of the mortgage, subject to the objection that sufficient ground had not been made for its admission.

*James A. Smith*, the Deputy Registrar, produced the memorial, dated 26th May, 1856, of a mortgage between James Connell and Peter J. O'Neill, of the land in question, registered the third of June, 1856.

*John Gemmell*, the Deputy Clerk of the Crown, said: The document produced was forwarded to him by mail, by the Clerk of the County Court of York. It purported to be a deed of assignment from O'Neill to Feehan.

*James Connell* said: The memorial produced was signed and executed by him, and was the memorial of the mortgage in question. He executed it on the day of its date. He looked at the assignment produced and proved the signature of P. J. O'Neill to it. It was dated 12th September, 1859, and registered 15th September, 1859. In the schedule annexed to the deed was the land comprised in the mortgage.

For the defence, it was shewn that one Timothy Davern went on to the land in January, 1851, when it was in a state of nature, and that he had since then, on several occasions, tried to buy the land; he squatted on the land and never bought it.

There was no other evidence noted by the learned Judge. But there was with the exhibits a conveyance of the 26th of October, 1868, from Thomas Moss West to Henry

Branton, of the land in question for \$278, and another conveyance of the 26th February, 1870, from Branton to the defendant, of the land in question, for \$520. Both of these documents recited a mortgage which they allege to have been given by Timothy Davern to Thomas Moss West, on the 5th October, 1867, for \$240, on the land in question.

The learned Judge entered a verdict for the plaintiff.

In Michaelmas Term last, *Harrison*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside, and a nonsuit or verdict entered for the plaintiff, on the ground that the mortgage from James Connell to Peter J. O'Neill was not produced and proved, and there was not sufficient evidence given of due search having been made for it to let in secondary evidence of it: that there was adverse possession of the land prior to the giving of the alleged mortgage, which possession was since continued, and the mortgage, if any, was void under the Statutes against bracer, maintenance, and buying of pretended titles: that the plaintiff's title as claiming under Feehan, the alleged assignee of the mortgage, was not proved: that there was no legal proof of the alleged suit in Chancery, nor was there any legal evidence of the alleged vesting order in the Chancery suit, so as to transfer the title, if any, of Feehan to the plaintiff; and so the verdict was against law and evidence, and a nonsuit or a verdict for the defendant ought to have been entered.

In this Term *McMichael*, Q. C., shewed cause. The principal question is, whether sufficient proof was given of a search for and of the inability to find and produce the mortgage, which was proved to have been given by James Connell to Peter J. O'Neill, in the year 1856. There was evidence that such a document had been executed, and a sufficient and reasonable search made for it: *McGahey v. Alston*, 2 M. & W. 214; *Hart v. Hart*, 1 Hare, 1, 9; *Gathercole v. Miall*, 15 M. & W. 319-329. The secondary evidence was plainly sufficient, if it were properly admitted, for the mortgagor himself proved it from



memory, and the memorial produced from the Registry Office, which was executed by the mortgagor, was also proved by him: *Sadleir v. Briggs*, 4 H. L. C. 435; *Peyton v. McDermott*, 1 Dr. & Wal. 198; *Doe dem. Ubele v. Kilner*, 2 C. & P. 289. The following cases also shew the sufficiency of the search: *Doe dem. Richards v. Lewis*, 11 C. B. 1035, 1054; *Rex v. Denio*, 7 B. & C. 620; *Rex v. Morton*, 4 M. & S. 48; *Regina v. Saffron Hill*, 1 E. & B. 93; *Regina v. Fording Bridge*, E. B. & E. 678; *City of Bristol v. Wait*, 6 C. & P. 591.

*Harrison*, Q. C., supported the rule. This mortgage was the very foundation of the action, and the greatest diligence should have been used to procure it: *Quilter v. Jorss*, 14 C. B. N. S. 747, per *Williams*, J., 753. The mortgage was last seen in O'Neill's possession. It was not shewn to have ever passed from his custody. He was said to be living in Michigan, in the United States. There was no presumption that he gave the mortgage to Feehan, to whom he made a general assignment for the benefit of his creditors, because the assignment was not of this specific property, but of all his estate and effects. The schedule of papers which Feehan delivered into Chancery in the suit against him in respect of O'Neill's estate, did not contain this mortgage. The presumption is, he did not get it. If it is to be assumed he did get it, then a proper search should have been made among his papers. The authorities on the point have been already cited. As to the Chancery papers admitted, they being merely office copies should not have been received. Office copies are received only in the Court in which the originals are, not in other Courts: *Tay. Ev.*, sec. 1382, 6th ed. p. 1324, and the authorities there referred to. See also *Brown v. Thornton*, 6 A. & E. 185.

WILSON, J.—There is no question what the rule of law requires to be done before secondary evidence is admitted. The dispute always is whether the particular facts have or have not shewn a case to let in the secondary evidence.

The best evidence of which the case is susceptible should always be given. If a deed has to be proved, the production of the deed is the best evidence of it. If it cannot be produced, it must be shewn why it cannot, as that it has been lost or destroyed, or is in the possession of the opposite party, or of some one who is not compelled to give it up.

The first step is to shew that such a deed once existed: *Doe dem. Padwick v. Wittcomb*, 6 Ex. 600. The next is to shew in whose custody it was last seen or known to be, if that can be done; or to shew who was the person who was entitled to the custody of it; and having discovered the custody of it, or the proper custody for it, to make search there for it, and if it cannot be found on diligent search, then secondary evidence may be given of it.

In this particular case the mortgage was proved to have been made by the mortgagor himself, and by the fact of its registration in the county office, proved by the memorial, which was executed by the mortgagor.

The mortgagor said he last saw it with the mortgagee about a year after the giving of it, which would be sometime in the year 1857, in the mortgagee's office, the mortgagee being then a merchant in the City of Toronto.

The mortgagee became insolvent, and made an assignment of all his estate and effects to Feehan in September, 1859, and absconded, it is said, to the United States. But about what year was not shown, excepting that it was more than six years ago, as Feehan, it was said, absconded also to the United States shortly after O'Neill did, and Feehan it was said had been gone more than six years.

No search was made with O'Neill or with Feehan since they left this country, if they are living, nor with any one claiming from them or having the custody of their papers in the United States.

The mortgage was not shewn ever to have been in the actual possession of Feehan, although the land was assigned to him by the mortgagee.

In the suit commenced against Feehan in Chancery, by Mr. Morphy, on behalf of himself and the other creditors, for whom Feehan was trustee, and which resulted in the appointment of the plaintiff as Receiver, Feehan produced the papers in that suit under an order of the Court, and this mortgage was not among the papers returned by him and scheduled.

It appears, therefore, satisfactorily, that the mortgage was not delivered by Feehan into Chancery. And I think it reasonably appears that Feehan had not the mortgage at the time he delivered the papers into Chancery, for the presumption is that he would have given it up under the order of the Court if he had then had it, rather than have incurred the penalty of an attachment for disobedience. And there is no reason to suppose that Feehan had any object in specially withholding this mortgage from the Court.

Now what was done in the way of search was this: Mr. Winchester, a clerk in the office of Mr. Morphy, the plaintiff in the bill filed against Feehan and others, and the solicitor for the Receiver, said he had searched in the Master's Office, which was unnecessary after what has been said of the scheduled papers, and he had searched among the papers of Mr. Strong, who was the solicitor for Mr. Feehan in that suit, and he had searched also among the Receiver's papers, which was perhaps also unnecessary. And he had searched in the papers of Cameron & Holmsted, Mr. Cameron having been O'Neill's solicitor.

The evidence shews that enough has been done as to Feehan to let in secondary evidence. The schedule he gave in shews sufficiently he had not the mortgage, and the Master's Office and Receiver's papers shew also he did not give it in; and the search with his solicitor shews he did not give it to him. The witness says he did not know who the solicitor of O'Neill in that suit was.

The case then is: In 1857 the mortgage was last seen with the mortgagee. That mortgage does not appear to

have passed from the hands of the mortgagee to the possession of the assignee, Feehan. The mortgagee absconded, but when is not precisely stated. We should be inclined to think the presumption would be that he did so shortly after he assigned his estate.

A sufficient search has been made as to Feehan, and those claiming under him. Should search have been made with the mortgagee, who absconded many years ago to Michigan, and who appears to be still living, or at any rate with his attorney in the Chancery suit before mentioned?

In *Alivon v. Furnival*, 4 Tyr. 751, a document deposited for safe custody with a notary at Paris, was held to be provable by a copy, on its being shewn that it was not allowable to remove such documents, as it was shewn to be out of the power of the party to produce the original.

In *Boyle v. Wiseman*, 10 Ex. 647, it was held that it was no ground for admitting secondary evidence of a private letter, that the person who had it was beyond the jurisdiction of the Court, and had refused to deliver it up when requested by a person who did not disclose the purpose for which it was wanted.

In *Quilter v. Jorss*, 14 C. B. N. S. 747, a paper was taken from the defendant, at New York, by the civil authorities. The defendant demanded it from the authorities at New York. He was told it had been sent to the authorities at Washington. He did not go there for it, or make any demand upon the Washington authorities for it. *Held*, the demand he had made was sufficient, and that from the nature of the document it was not likely it would have been given up to him.

In *Bryan v. Wagstaff*, 2 C. & P. 125, it was held that a notice to produce papers served on the attorney was sufficient, although the client was abroad, as it would be presumed the client had left all papers material in the cause with his attorney.

In *Sturge v. Buchanan*, 10 A. & E. 598, a notice to produce served on the attorney was deemed sufficient to let in secondary evidence of the contents of letters written by



the client to his partner in New South Wales, because long litigation between the parties in Chancery had made it probable that they had been remitted to this country for use in that cause.

If the papers of the attorney of O'Neill, in the suit of Morphy against him and Feehan, with respect to the trust assignment, had been searched, I think sufficient would certainly have been done to let in secondary evidence of the contents. That was not shewn to have been done. Still can it be assumed that O'Neill, after assigning the whole of his estate to Feehan, and after absconding from the Province as an insolvent debtor, can still have possession of the mortgage?

It is true Feehan was never positively shewn to have had it. He would be presumed not to have had it at the time he delivered in the schedule of documents to the Court of Chancery, but that suit was commenced many years after the assignment was made to him, and after his own affairs had become deranged, but whether before or after his absconding does not appear. And he may have lost or mislaid it between the date of the assignment and the time when he gave in the schedule.

O'Neill on absconding could perhaps scarcely be presumed to have carried the mortgage with him. He had assigned his interest in it. He could not have made any use of it, and many years have since elapsed, and it is not pretended he has ever attempted to make use of it. He probably was more embarrassed than to make it likely he would retain any interest in his estate, especially after absconding from his creditors.

Under these circumstances I am not prepared to say there is any presumption that O'Neill retained the mortgage or took it with him to the United States. "It is not necessary to negative every possibility—it is enough to negative every reasonable probability—of anything being kept back. The evidence must be according to the circumstances of the case." Per Alderson, B., in *McGahey v. Alston*, 2 M. & W. 206, 214.

It is unnecessary to make any observations as to the memorial. The following cases may be referred to as to the memorial, in addition to those that were cited: *Gough v. McBride*, 10 C. P. 166; *Ansley v. Breo*, 14 C. P. 371; *Moriarty v. Grey*, 12 Ir. C. L. R. 129.

The legal title was proved to have passed to O'Neill, from the Crown downward. And the defendant had the interest of a squatter only, although he and those under whom he claimed have had many years of undisturbed possession.

In this case the secondary evidence was rightly received.

The question of maintenance was not argued. The C. S. U. C. ch. 90, sec. 5, from the Act of 1851, has long since settled that point.

Then it was said the title from Feehan was not proved: that is, that the Chancery proceedings and vesting order were not sufficiently proved.

The final order of foreclosure can be of no consequence, as Feehan had the title independently of it.

The objection is as to the proof of the vesting order in the plaintiff as Receiver.

That document has the stamp or impression on the paper of the seal of the Court of Chancery and it is signed by the Registrar of the Court. It was made under the Imperial Acts 13 & 14 Vic. ch. 60, and 15 & 16 Vic. ch. 55. The 9th section of the former Act declares that "the order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands in the same manner and for the same estate." See also C. S. U. C. ch. 12, sec. 63, where the language is rather stronger.

It is said a decree is not admissible as an adjudication of the subject contained in it, unless the bill and answer are put in on which it is founded, because without such proof it may be impossible to understand the decree, or to ascertain with certainty what disputed questions have been decided by it. But when the decree fully recites the bill and answer, it is alone sufficient: *Leake v. Westmeath*, 2 Moo. & Rob. 397; *Wharton Peerage Case*, 12 Cl. & F. 301.

In this case it appears to me that the vesting order can be perfectly understood without the bill and answer. It recites certain proceedings in Chancery between the parties in a general form. It then proceeds: "It is ordered that in pursuance of the Trustee Acts above mentioned, the said Thomas Gordon be and he is hereby appointed trustee of the estate, real and personal, of the said defendant Peter J. O'Neill, in the room and stead of the said defendant Dennis Kelly Feehan. And in further pursuance of the said Acts, it is ordered that all the said estate be and the same is hereby vested in the said Thomas Gordon, his heirs and assigns for ever, for all the estate and interest of the said defendants Dennis Kelly Feehan and Peter J. O'Neill therein and thereto, upon the trusts of the deed of assignment in the pleadings in the said cause mentioned." The land in question is particularly mentioned along with all the other properties in the order.

If the deed of assignment, instead of being referred to as "in the pleadings in the said cause mentioned," had been specifically described, so that it appeared to be the assignment from O'Neill to Feehan, the order would have recited quite enough to have made it perfectly intelligible without the aid of any other documents.

There was, however, a mortgage proved from Connell to O'Neill of this land, and an assignment in trust from O'Neill to Feehan of this, with other property, for the benefit of creditors. And the copy of that assignment was filed at the trial, endorsed: "In Chancery. Morphy v. Feehan. Copy of assignment of O'Neill to Feehan, filed, 1st March, 1862." So that there is some evidence that an assignment referred to "in the pleadings in the said cause," corresponds with the assignment put in at the trial.

I am not, however, at all certain that it was necessary to do more at the trial than merely put in the vesting order, for it does, just as if a conveyance had been executed, pass the property to the plaintiff.

My opinion is that the order itself, having that effect and operation, is valid and receivable in evidence for the

purposes of this suit, without shewing why it was made. The legal title has passed by it, and that is all we have to do with in the case.

The rule will therefore be discharged.

MORRISON, J., concurred.

*Rule discharged.*

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BURNHAM ET AL. V. RAMSAY ET AL.

*Contract for land to be selected—Time for making selection—Specific performance.*

R. gave a bond to B., to convey to B. a water privilege on lot 17, and to convey also so much land as he might require for the purpose of making a raceway or for erecting buildings on the said lot, at the rate of £10 per acre.

*Held*, that the selection of such land must be made during the lifetime of both obligor and obligee.

*Quære*, per *Wilson, J.*, whether a bill would lie for the specific performance of such a contract.

EJECTMENT for part of lot 17, in the 1st concession of the Township of Hamilton, containing 2 acres, 2 roods, 15 perches.

The plaintiffs claimed—1. Under a bond for a deed from John Ramsay to one Francis Burnet. 2. Under the will of the said John Ramsay, and the probate thereof granted to Arthur McBean and David M. Burnham, the executors thereof. 3. Under the will of the said Francis Burnet. And, 4. By deed from the said Arthur McBean to the plaintiffs.

The defendants denied the title of the plaintiffs, and Mary Ann Ramsay asserted title in herself to an undivided third part as the heiress-at-law of the late William H. Ramsay, deceased, who was the devisee thereof under the last will and testament of the late John Ramsay, deceased. And Robert H. Ramsay and Samuel J. J. Ramsay, the other defendants, asserted title in themselves to two undivided third parts of the land, under the last will and testament of the late John Ramsay.

The cause was tried at the last Fall Assizes at Cobourg, before Hagarty, C. J., C. P., without a jury.



The facts of the case were : John Ramsay, on the 1st of March, 1845, made his bond to Francis Burnet, to convey to Burnet a water privilege on lot 17, in the first concession of Hamilton, in fee, for £50, to be paid in two years, and to convey also in fee simple to Burnet so much land as he might require for the purpose of making a raceway, or for erecting buildings on the said lot, at the rate of £10 per acre.

On the 28th of March, 1850, John Ramsay made his will, devising his property to his sons William, Robert Henry, and Samuel J. Johnson, subject to the maintenance of his widow during her widowhood. Arthur McBean and David Burnham were appointed executors, who both proved the will.

On the 8th of June, 1853, a deed was made between Arthur McBean and David Burnham, the executors of John Ramsay's will, of the one part, and Francis Burnet, of the other part. The bond and will of John Ramsay were recited, and it was recited that Burnet did require for a raceway and for erecting buildings on the said lot, and the said water privilege, the following parcel of land—then setting it out by metes and bounds, and containing 2 acres, 2 roods, 15 perches, being the land in question in this cause. And it was recited that Burnet paid Ramsay, in his lifetime, part of the consideration money, and then paid the executors the residue of it. Then the executors, so far as they could in that capacity, conveyed the said land to Burnet in fee.

On the 3rd of April, 1858, Francis Burnet made his will, and devised his property in trust to his wife ; and by his codicil, of the 15th of July, 1858, he devised it to the now plaintiffs in trust with his wife. The three were also appointed executors and executrix. They proved the will and codicil.

On the 7th of October, 1870, by deed made between Arthur McBean, the surviving executor under John Ramsay's will, of the one part, and the now plaintiffs in this suit, Burnham and Burnet, the surviving executors of

the will of Francis Burnet, of the other part—after reciting the recitals in the deed of the 8th of June, 1853, and of the making of that deed—the party of the first part, as executor as aforesaid, in pursuance of the Act of the Parliament of Ontario, 33 Vic. ch. 18, and in consideration of the moneys before paid, conveyed the land in question in fee to the present plaintiffs.

The evidence shewed that Burnet built a mill on lot 16, on the stream which crossed this lot 17, just across the road, because there was not sufficient head of water on lot 17.

Francis Burnet wanted the land in question for building purposes. It was not suitable for a water privilege or race; part of it would be fit for buildings for a mill. Francis Burnet was in possession of the land in question in 1848. Ramsay's children were then, and at the time the deed of 1853 was made, under age.

The evidence for the defence was, that John Ramsay owned the north half of lot 17, and that there was a water privilege on the south part of his land. The witness *Job Heals*, said he lived on part of Ramsay's land, 16 rods north of the privilege on it: that his land interposed between the privilege and the piece of land in this suit which Burnet got for buildings, and that it was not fit for a mill or for buildings used with a mill; it was on a hill higher than the top of the witness's house; the witness's land was on the creek; Burnet had no place for his buildings, unless he went north of the witness's land. Burnet built his mill on lot 16 after Ramsay's death, and he was not in possession of the land in question till after Ramsay died in 1850. *J. C. White* spoke to nearly the same effect.

*Mrs. Ramsay*, the widow of John Ramsay, said that Burnet had never taken possession of the privilege south of Heal's land; he said it was of no use to him; he must get the land in question on the hill.

It appeared that an action of ejectment was brought by the now defendants against Alexander F. Burnet for the

land in question in September, 1870. No appearance was entered, and a writ of possession was executed in July, 1871.

The learned Chief Justice found, for the purposes of the suit, that the legal estate had passed by the deed of 1870 to the plaintiffs. As a fact he found that possession of the land was not taken till after Ramsay's death, and that Francis Burnet selected the land in question, as evidenced by the deed of 1853, but not till after Ramsay's death.

It was admitted the deed of 1853 passed no title. It was the one of 1870 which was relied on as passing the title under the statute.

The learned Chief Justice noted that his impression was against the right of the executors or of the survivor to act as they or he did.

The verdict was thereupon formally entered for the plaintiffs.

In Michaelmas Term last *J. W. Kerr* obtained a rule calling on the plaintiffs to shew cause why the verdict should not be set aside, and a verdict or a nonsuit entered for the defendants, on the following grounds: That the deeds under which the plaintiffs claimed were and are inoperative, because,—(1) the executors who made the same had no estate in the land, and no power under the Statute of Ontario 33 Vic. ch. 18, because the testator had not entered into any contract for the sale and conveyance of the land in question; and because (2) the plaintiffs are not the persons entitled under the will of the late Francis Burnet to receive the conveyance; and because (3) the wills passed no estate in the land to the plaintiffs.

In this term *Moss*, Q. C., shewed cause. It is contended, not that the executors of Ramsay had power by his will, but that the surviving executor had power under the statute, to convey the land as he did by the deed of 1870 to the plaintiffs. Sec. 4 adverts to and remedies the difficulty which existed in such cases, and sec. 6 enables the surviving executors to act as all might have acted if all of them had been living. The question is,

was there a contract between Ramsay and Burnet which Burnet could have compelled Ramsay to perform? There was; and a decree for specific performance could have been obtained against Ramsay: *Hook v. McQueen*, 2 Grant 490; *Marsh v. Milligan*, 3 Jur. N. S. 979; *Parker v. Taswell et al.*, 4 Jur. N. S. 183; *South Wales Railway Co. v. Wythes*, 5 DeG. M. & G. 888. [*Patterson*, Q. C.—We admit that.] The statute, at all events, is not restricted to cases where specific performance could be had. It applies wherever there is a contract binding either in law or equity. Burnet, then, did in fact select the land he required under the bond. The deed of 1853 is evidence of that fact, and the contract upon such selection became complete as to its terms. It was not necessary the selection should have been made by him in Ramsay's lifetime. The selection he made in 1853, though after Ramsay's death, was a valid selection, and it was made for building purposes, according to the tenor of the bond.

*Patterson*, Q. C., and *J. W. Kerr* supported the rule. The statute will be rather startling if it has the effect contended for. The bond here was made in 1845, to convey, not any specific land, but such land as the obligee should select. There was no selection in the obligor's lifetime, and the obligee, therefore, was never in a position to compel him to convey; but it is said this Act enables the plaintiffs to get, twenty-five years after the obligor's death, what during his life they were never entitled to. The statute referred to does not apply to such a case, and where the testator never sold any specific land the purchaser, under such a contract as this, cannot give the go-by to the devisees and get the conveyance from the executors. Burnet made a selection in fact in Ramsay's lifetime, when he selected the mill privilege to the south of Heal's land. He had no right to make any other or any further selection. The land he has got since Ramsay's death is not of the kind the bond provided for. It is not adapted to the purpose of a race-way, and the buildings referred to were of course *mill* buildings. The land selected



for *such* buildings is on a hill, and away from the privilege that was then bargained for, and he could only claim a reasonable extent of land, and not any unlimited quantity. The selection, whatever or wherever it was, must have been made in the lifetime of both parties, and not after the death of either of them : *Shep. Touch.* 100. The evidence shews that after Ramsay's death Burnet said he wanted *other* land than the land he had got, as it was of no use to him ; and the statute does not enable different land to be conveyed than the parties had contracted for. If the selection could be made after Ramsay's death, then the whole question is one of evidence, whether Burnet did or did not select all he required before Ramsay's death, and, if he did not, whether the land he has since selected was or was not adapted for buildings, and whether such buildings were not intended by the parties to have been such buildings as are usually required for mills.

WILSON, J.—If an election were made by the obligee, Burnet, in the lifetime of Ramsay, the obligor, of the land which he might require for the purpose of making a race-way or for erecting buildings on the lot, the terms of the bond were then completed as to the land to be conveyed, and the selection made was final, and could not either be varied from or added to afterwards.

In that case the land in question was certainly not selected, and so it cannot be in dispute properly in this cause. If it were not selected at that time, and the plaintiffs say it was not, and if it were selected for the first time in 1853, which is the plaintiffs' assertion, then the defendants say that such election was void, because it was after the death of John Ramsay.

It is said in *Heyward's* case, 2 Co. 35, that if one have an interest in a thing, and an election to claim it by two several titles, as if one demise, grant, bargain, and sell his land for years, that the lessee has an interest at once, and he may elect to take it by way of demise at the common law, or by way of bargain and sale under the statute.

And in such a case, before election made by the lessee which way he would take, he might assign over, and his assignee might make the like election, though both lessor and lessee were dead. But when the election is to claim one of two several things, nothing passes before election. As if one have three horses, and he give one of them, the election ought to be made in the lifetime of the parties, for as no one of the horses is given in certain, the certainty, and thereby the property, begins by election.

So it is also said there: "The Bishop of Sarum, having a great wood of 1,000 acres (called Berewood) enfeoffed another of an house and seventeen acres, parcel of the wood, and made livery in the house, none of the wood passed before election, and therefore his heir shall not make election."

A stranger cannot elect how a party who has an interest, and who may take by one of several means, shall take, though one having title from the lessee or grantee may elect: *Miller v. Green*, 8 Bing. 92.

It is plain from *Heyward's* case and *Shep. Touch* 250, 251, that the election must be made in the lifetime of both grantor and grantee. Unless that were so, there would be the absurdity of a grant, not valid and imperfect in the lifetime of the parties, made a grant against them after their death, while it requires the assent of both parties to make a valid grant.

Without going further, we may dispose of this case on the very ground on which the plaintiffs have put their case.

Whether the obligee could have filed a bill for specific performance of a contract to convey "so much land as he might require for the purpose of making a race-way, or for erecting buildings on the lot," I am by no means certain. It was conceded on the argument that he could. See *Stuart v. The London, &c., R. R. Co.*, 15 Beav. 513; *South Wales R. R. Co. v. Wythes*, 5 DeG. M. & G. 881, and other cases mentioned in *Fry* on Specific Performance. We say nothing on that point.

The rule will be absolute to enter the verdict for the defendants.

MORRISON, J., concurred.

*Rule absolute.*

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JARDINE V. WILSON ET AL.

*Ejectment—Will, construction of—Estates tail—"Revert in the same way."*

A testator, who died in 1868, devised land to his son D., and other land to his daughter A., charged with legacies to his other children. The will further declared that if D. died without heirs D.'s property "shall remain for the use of his widow during her life, after which it shall be divided as seems best between the rest of my children," and if A. died without heirs the property devised to her "shall revert in the same way." D. was married before the making of the will, and A., after the testator's death, married the plaintiff, and died in 1870.¶

*Held*, that D. and A. took estates tail, for the persons in remainder, the rest of the testator's children being the collateral heirs of D. and A., only lineal heirs could have been intended to take under D. and A.

*Held*, also, that the words "revert in the same way" meant "shall follow in like manner," and that therefore A's husband after her decease took a life estate in the property devised to her, as D.'s wife would take in that devised to D.

EJECTMENT, for the north half of the north quarter of lot number thirty-one in the fifth concession of the township of Pickering, except one acre in the north west corner owned by Benjamin Doten.

The plaintiff claimed the premises as the husband of Annabella Jardine, formerly Annabella McIntyre, deceased, devisee of the same under the last will and testament of Nichol McIntyre, late of Pickering, deceased.

The defendants, besides denying the plaintiff's title, claimed under the other persons who claimed as devisees under the same will.

The cause was tried at the assizes held at Whitby last fall, before Hagarty, C. J., C. P., without a jury.

It was admitted that Nichol McIntyre died seised in fee on the 10th of May, 1868, and that he made his will sufficient to pass real estate on the 9th of October, 1867.

By this will the property was devised to the testator's wife for her life, and she died, as before mentioned, in 1870. On her death the land in question was to be divided between Annabella and Dugald, two of the testator's children; the north part to be given to Annabella and the south part to Dugald. These two devisees were to pay, equally between them, legacies to the other children of testator to the amount of \$800. Then the will proceeded "And further, my desire is that should my son Dugald die without heirs, the property hereby given shall remain for the use of his widow during her life, after which it shall be divided as seems best between the rest of my children. And also should my daughter die without heirs, the property hereby devised shall revert in the same way."

The testator's widow survived him, and died on the 8th of August, 1870. Dugald, the son of the testator, married many years before this will was made, and there were no children of the marriage. He and his wife were still living. The testator's daughter Annabella was unmarried at the death of her father. She married the plaintiff on the fourth of March, 1870, and died on the nineteenth of May, 1870, without issue. Other children of the testator named in the will were still living, and the defendants claimed under them as tenants.

The question was, what was the effect of a clause in the will of Nicol McIntyre devising the land in question to Annabella.

The plaintiff as her surviving husband claimed the land for his life under the devise to his wife, which he contended should be construed in his favor, in like manner as the clause of the devise of land to Dugald was to be construed in favor of Dugald's wife, if she survived him.

A verdict was entered for the defendants, with leave to the plaintiff to move to enter a verdict in his favor, if the Court should be of opinion that he was entitled to recover.

In Michaelmas term last *C. S. Patterson* obtained a rule calling on the defendants to shew cause why the verdict



should not be set aside and a verdict entered for the plaintiff.

During this term the rule was argued before *Wilson, J.*, alone.

*J. K. Kerr*, shewed cause. The very strictest construction of the clause relating to Annabella's devise might be, that on her death without heirs her share should revert to Dugald's wife, as that is "the same way" Dugald's share is to go, if he die before his wife. But the testator did not mean that. As to the meaning of the word *revert*, see *Coventry & Hughes*, Dig. 1218.

Annabella was not married when the testator died, and her husband, a person not in existence then or at the making of the will, cannot have been intended to take under it. If she had been married at the time of the making of the will, her husband would still not have taken the land on her death: *Cline v. Fooks*, 3 DeG. & J. 252; *Moore v. Raisbeck*, 12 Sim. 123; *Hawkins on Wills*, 85, 89. The children to take are those who were alive at the testator's death: *Mann v. Thompson*, Kay 638; *De Witte v. De Witte* 11 Sim. 41; 2 *Jarman on Wills*, 3rd ed., 142. The will in *Melsom v. Giles et al.*, L. R. 5 C. P. 614; S. C. in Ex. Ch., L. R. 6 C. P. 532, is in some respects like the present will.

*Patterson*, Q. C., supported the rule. The fact that Annabella was not married at the time of the making of the will is of no consequence. The word *heirs* in the devise to her means *children*; and as they are provided for, the testator must have contemplated her marrying: *Paul v. Children*, L. R. 12 Eq. 16, is somewhat similar. The testator devised one share of his property upon trust for his niece B. and her husband and for her child or children, and gave another share upon such trusts in favor of his niece C. and her husband and child or children "as shall correspond with the preceding trusts in favor of B. and her husband and her child or children." C. had only one illegitimate child, born before her marriage, and she was fifty years old at the date of the will; but it was held that this child did not take. The reason must have been that the testator contemplated the birth of other children.

The word *revert* is not used in a technical sense; but however construed it means that, as in the case of Dugald's

devise, his widow, if she survive him, and there be no children of the marriage, is to hold her husband's share for her life before it shall go over to the testator's children; so in Annabella's case, if she die without children, her share should go to her husband for his life before it shall go over to the testator's children. That is, in fact, making the land revert or pass *in the same way* as nearly as possible, considering the difference of sex of the two devisees: *Habergam v. Ridehalgh*, L. R. 9. Eq. 400, lays down the general rule as to the construction of words in a will.

WILSON, J.—There is no doubt of the meaning of the whole clause containing the devise to Dugald. The language is plain enough.

By the early part of the will, as Dugald and Annabella had to pay sundry legacies, they would take the fee, in the absence of any other expression appearing in the devising part of it. But, as the testator was seised in fee, it is also to be "considered that the devisor intended to devise all such estate as he was seised of in the same land," nothing to the contrary appearing on the face of the will: C. S. U. C. ch 82, sec. 12.

Then the clause in question declares that if Dugald died without heirs, his share should remain for the use of his widow for life, after which it should be divided between the rest of the testator's children. Under the law as it was in England before 1838, any limitation over after the devisee died *without heirs* was void for remoteness, unless limited to an event which must take place within the compass of a life in being and twenty-one years afterwards. But if the person in remainder were one who was capable of being heir to the first devisee, then the estate of the first devisee was construed to be an estate tail; because the devise over shewed that only lineal heirs of the first devisee were to take under him, as he could never be said to die without heirs general so long as he had any collateral heir: *Fearne* on Conting. Rem. 10th ed., vol. i. 466 *et seq.*, 430 *et seq.*, 395; *Jarman* on Wills, 3rd. ed., vol. ii. 492. (a)

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(a) See *Iler v. Elliott et al.* ante p. 434, 441-2.

That is still the law here. By it Dugald takes an estate tail, because the ultimate remainder is to the collateral heirs of Dugald, the rest of the testator's children.

After his death his widow will take her life estate, if he die without heirs of his body: *Cru. Dig.*, tit 16, ch. 1, sec. 6. And on her death the rest of the testator's children will take the fee simple.

Annabella, in like manner, was tenant in tail by reason of the devise over to her collateral heirs.

None of the cases cited have any special application here.

The question is, whether the daughter's property, in the event provided for on her death, which is to *revert in the same way* as Dugald's property is to revert, will go to Annabella's husband, as Dugald's share is to go to his widow?

Annabella was not married at the time of the making of the will, but it is impossible to say the testator did not contemplate the possibility or probability of her marrying.

By "dying without heirs," he plainly intended whatever the law may intend for him, dying without issue or children of his son and of his daughter. And as he had given the widow of his son a life estate if her husband died without issue; so, reverting in the same way, means, in my opinion, that the husband of the daughter shall in the like case take an estate for his life.

"Revert" is not used in a technical or formal sense. It means, in the will, "shall follow in the like manner," making allowance for one of the persons being a son, and the other a daughter.

If Annabella took a fee simple, the life estate to the husband could have no place. If she took for life only, treating the word "heirs" as children, the husband has a life estate. Or if she took in tail, for the reason before stated, the husband has also a life estate.

In my opinion she did not take in fee absolutely, but in tail only, which gives effect to the devises over. And in such a case the husband may have a life estate on the determination of the estate in tail.

The case was argued on the assumption that Dugald's

wife will, if she survive her husband and he have no issue take an estate for her life, and that Dugald has such an interest by the will as will support the estate for life. And it was contended the language used did not give the like right to Annabella's husband as it did to Dugald's wife.

I think it does give him the like right which Dugald's wife has, or will have: *Cule v. Thorn*, Cro. Car. 186; *Shep. Touch.* 101, 104; *Gough v. Howard*, 3 Bulstr. 127, per Croke, J.; *Right d. Compton v. Compton*, 9 East 267; *Doe d. Woodall v. Woodall*, 3 C. B. 349. And that the rule must be absolute to enter the verdict for the plaintiff.

*Rule absolute accordingly.*

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#### IN THE MATTER OF ANDERSON FOSTER AND THE GREAT WESTERN RAILWAY COMPANY.

*G. W. R.*—16 Vic. ch. 99—*Application for money paid into Court—Costs of arbitration.*

Under 16 Vic. ch. 99, sec. 5, if a greater sum be awarded for land taken by the Great Western R. W. Co. than that tendered by them, "the Company shall pay all costs and charges attending such arbitration;" but no provision is made for their recovery. The Court refused to make an order on the Company for payment of such costs; and, *Semble*, that the only remedy is by an action of debt on the statute. The money awarded having been paid into Court by the Company, with six months' interest, and it being from no fault on their part that the claimant did not receive it within the six months, the Court discharged with costs a rule calling upon them to pay further interest; and it was referred to the Master to report as to the claims filed, and the right of the applicant to the money.

*F. Osler* obtained a rule *nisi* calling upon the Great Western Railway Company to shew cause why the sum of \$800 paid by the company into Court should not be paid out to the claimant, Foster, or his attorney, and why the company should not pay to Foster interest on the \$800 from the date of publication of the award made in this matter; also why the company should not pay Foster his reasonable costs and charges attending the arbitration in this matter.



The rule was drawn up on reading the affidavits and papers filed, by which it appeared that the company had taken for the uses of their railway a piece of land which Foster claimed as owner: that the company tendered to Foster, under the provisions of the Statute 16 Vic. ch. 99, sec. 5, \$546, as compensation therefor, which Foster would not accept: that the company then paid the money into Court under the sixth section, and the matter in dispute was referred to arbitration under the provisions of that statute, and the arbitrators, on the 31st of June, 1871, awarded \$800, and they specified and settled the costs of the award at the sum of \$31: that the company, under the provisions of the 7th section of the Act, on the 9th of September, 1871, paid the \$800 into this Court, having previously tendered the amount to the claimant, Foster; and it also appeared that the company paid the costs so settled by the award.

During this term *Robinson*, Q. C., for the company, shewed cause, filing affidavits, and referring to *Foster and The Great Western R. W. Co.*, ante, p. 162.

*Osler* supported the rule.

MORRISON, J.—Under the fifth section of the 16 Vic., ch. 99, the award referred to in this application was made, and it merely provides that, in case a greater sum be awarded by the arbitrators therein mentioned than the amount which the company tendered the owner or occupier as compensation for the land taken, the company shall pay all costs and charges attending such arbitration. The statute makes no further provision and gives no special remedy or directions for enabling the owner to recover these costs. It seems to me the only remedy, if the claimant is entitled to any costs, would be an action of debt on the statute. I can find no authority, and none was cited, for this Court to interfere as asked by this rule.

Then as to that part of the rule calling on the company to pay a further amount of interest than the six months paid into Court. The seventh section of the statute referred

to provides that, when a sum is awarded as compensation, as in this case, the company may pay such compensation into Court, with six months interest thereon, and deliver to the Clerk of the Court an authentic copy of the award, and such award shall thereafter be deemed to be the title of the company to the land therein mentioned. And the section provides for public notice being given, calling upon all persons entitled to the land, &c., to file their claims to the compensation, or any part thereof, and the Court shall receive all such claims and adjudicate upon them, and make order for the distribution and payment of the compensation, &c.; and the costs of the proceedings, or any part thereof, shall be paid by the company, or by any other party, as the Court shall deem it equitable to order, &c.

All these proceedings were had in this Court, and it appears that the company paid the amount awarded into Court last September, with six months interest; and this claimant, if he is entitled to receive the amount, might and ought to have filed his claim immediately after the ninth of September, the date of the public notice given by the Clerk of this Court, and might have obtained, if entitled to it, the order for payment of the compensation he now seeks before the six months expired. At least, the affidavits shew that it was not from any error, fault, or neglect of the company that the claimant did not receive the money before the expiry of the six months. I therefore see no pretence for asking the Court to order the company to pay to the claimant any further interest.

Then as to the payment out of the Court of the \$800 and interest to this claimant. Upon reading the affidavits of the claimant and his attorney, an order will go referring the matter to the Master of this Court to report whether there are any other claimants, besides the claimant, who have filed claims to the compensation in question, or any part thereof; the affidavits filed are silent in that respect; if no other claims, then whether it appears this applicant is entitled to be paid the amount, or any portion thereof, or otherwise, as the case may be.

As the Great Western Company has been unnecessarily called upon to answer the rule, it will be discharged, so far as it seeks the payment of further interest and the costs attending the arbitration, with costs to be paid by the applicant to the company.

WILSON, J., concurred.

*Rule accordingly.*

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REGINA V. THE GREAT WESTERN RAILWAY COMPANY.

*Highway established by Quarter Sessions—50 Geo. III., ch. 1—Omission to confirm at the next Sessions.*

By Geo. III., ch. 1, sec. 3, upon application in writing to a Surveyor of Highways, by twelve freeholders, for the opening of a new road, he is required to examine the same and report thereon in writing to the Justices, "*at their next ensuing Quarter Sessions*," giving public notice of such report as specified, and in the absence of any opposition "it shall and may be lawful for the said Justices" and they are required to confirm said report, and to direct such road to be opened; and when any application shall be made to the said justices in Q. S. assembled as aforesaid in opposition to said report, they are to empanel a jury out of the persons returned to serve as jurors at said Sessions, to determine the question, &c.; and such road so opened shall be a public highway.

The Report was dated 3rd July, 1837, and the notices given stated that it would be laid before the Q. S. on the 11th. So far as appeared, however, nothing was done at the July Court, but the report was confirmed at the October Sessions following.

*Held*, that the highway had not been legally established, the power of confirmation being confined to the Sessions next after the report; and that the fact of user was immaterial, the presumption of dedication being rebutted by the proof of the origin of the road.

THIS was a case reserved by the Judge of the County Court of the County of Elgin, presiding at the last Assizes held at Chatham, in place and at the request of Galt, J.

The defendants were convicted at the Quarter Sessions for obstructing a street in the town of Chatham, and the case was removed into this Court by certiorari.

On the trial certain documentary evidence was put in, and several witnesses examined on the part of the prosecution. It is not necessary for the purposes of this case that it should be all referred to. The matters given in evidence upon which the judgment of the Court is based were as follows :

A petition of twelve freeholders of the county of Kent, addressed "To P. P. Lacroix, Surveyor of Highways for the county of Kent, W. D.," dated 28th June, 1837, as follows:—"We, twelve freeholders of the county of Kent, residing in the town of Chatham and vicinity, considering the necessity of a new road along the western limit of the town of Chatham, in the township of Raleigh, from the river Thames to the rear of the front concession, upon lot No. 23, do hereby request you, the said Surveyor of Highways, to survey and lay out said new road, and thereon make your report to the next General Quarter Sessions of the Peace for the said Western District."

A public notice signed by P. P. Lacroix, Surveyor of Highways, county of Kent, dated 3rd July, 1837, setting out that at the requisition of twelve freeholders of the county of Kent, &c., he had laid out a new road upon lot No. 23, being, &c., (describing the road in question, and stating its course, &c.) and "which report I shall lay before the Court of General Quarter Sessions of the Peace for the Western District, on Tuesday, the 11th day of July instant."

Also a certificate of the Surveyor Lacroix, dated 10th July, 1837, that, on the 3rd of July, that he put the required two notices in the most conspicuous places next adjacent to the said road, &c., and that he knew of no opposition to the said road.

Also the following extract from minutes of the proceedings of the General Quarter Sessions of the Peace, holden at the Court House, Sandwich, on Tuesday, the 10th of October, in the first year of the reign of our sovereign lady Victoria, before John Prince, Esquire, chairman, &c.:—"Petition to P. P. Lacroix, Esquire, Surveyor of Highways, &c., to lay out a road in the township of Raleigh, from the river Thames to the rear of the front concession, upon lot No. 23, and his report thereon, as follows": viz., "To the Justices of the Peace at their General Quarter Sessions, to be held on the 11th day of July, 1837. I do hereby certify that at the request of twelve



freeholders, &c., I have laid out a road (describing the road in question), which report I have the honor to submit." Dated, 3rd July, 1837. "Mr. P. P. Lacroix having sworn to the proper notices having been affixed, and that there is no opposition to the same.—Road approved."

All these proceedings were had under the provisions of the Statute of U. C. 50 Geo. III. ch. 1.

Also a certified copy of a by-law passed by the corporation of the town of Chatham on the 30th June, 1871. This by-law recited, that under the laws of Upper Canada then in force, the Justices for the then Western District, at General Quarter Sessions for said Western District, on the 11th day of July, 1837, on the certificate and report of the surveyor of highways for the county of Kent, on the petition of twelve freeholders, &c., did lay out, approve and confirm the laying out of a public highway (setting out the road in question). It further recited that part of the road south of Grey Street, after being so laid out, fell into disuse, and the adjacent owners up to the line of the Great Western Railway, as well as the said railway, had enclosed and occupied the same: that the necessities of the inhabitants, &c., require that the said road, &c., should be opened up and made from Grey Street, &c.: that notice had been posted up in six places for one month prior to the passage of the by-law, of the intention to open up, make, repair, and improve the same, &c. The by-law then enacted that the said road be forthwith opened up, &c., from the westerly terminus of Grey Street (setting out the course of the road), as provided for in the order setting out, confirming, and allowing said road by the said Justices at General Quarter Sessions, as mentioned in the recitals, so that the same can be used as a travelled road, street, or highway.

It appeared from the evidence that after the order of Sessions was made, the alleged road had never been regularly opened out as a street—that is, no work or statute labor had been done on it, being merely chopped out and underbrushed: that it was, as the witnesses said,

like any of the bush roads of the country, and travelled over as such, until the company built their line across it and fenced it, which they did many years ago (1856), and kept it so fenced since; that no money was spent on the line by the town until nine years ago, when they dug a ditch along it from the north as far south as Grey Street, a long distance north of the railway crossing, and the road was not travelled south of Grey Street. The property over which the Sessions laid out the road was private property, and the nuisance complained of was the fence across the line of the road.

At the close of the case the defendants' counsel, among other objections, submitted that there was no evidence of a highway being laid out, because Lacroix's notices referred to an application to be made at the Sessions in July, 1837, and no application appeared to have been made until the October Sessions, 1837, when the Justices granted the road: that it was reasonable to expect that persons who might have made opposition in July would not have notice of the proceedings in the October Sessions: that it was not shewn that the road was laid out under an Act of Parliament; and that the order of Sessions was not a laying out within the meaning of 50 Geo. III., ch 1. Objection was also taken to the by-law, that the notice of it was insufficient; and that the road was not shewn to be a Government allowance, or that statute labor or public money had been laid out upon it: that it never assumed the character of a public highway; and that from lapse of time there was an abandonment of the land occupied by the defendants.

The learned Judge charged the jury that the line of road was duly established by the authority of the law in 1837, so as to constitute Lacroix Street a public common highway, and that any unqualified and constant stopping up of that highway was an indictable offence, whether blocked up or fenced in by a railway or an individual; and he asked the jury to say whether Lacroix Street was ever used and travelled by the public as a highway, as laid out

by Lacroix, before the defendants stopped it up, and also whether it was obstructed.

The jury found a verdict of guilty, and answered the two questions affirmatively. And the learned Judge reserved the questions of law arising on the trial for the consideration of this Court, and postponed judgment; the question for the opinion of the Court being, whether, upon the evidence and facts, the indictment and verdict thereon could be sustained.

There being doubts whether, the indictment having been removed by certiorari and tried in the Queen's Bench, the case could be reserved under C. S. U. C. ch. 112, a rule was obtained by *M. C. Cameron*, Q. C., to set aside the verdict and enter a verdict for the defendants, and by consent the case was argued upon this rule.

*Robinson*, Q. C., shewed cause, citing *Rex v. Sanderson*, 3 O. S. 103.

*M. C. Cameron*, Q. C., contra, cited *Re McCumber and Doyle*, 26 U. C. R. 516; *Regina v. Murray*, 27 U. C. R. 134; *Bowman v. Blyth*, 7 E. & B. 26, 47.

MORRISON, J.—The main point to be considered in this case is, whether the road in question was properly established under the provisions of the Statute 50 Geo. III. ch. 1, sec. 3. That section provides that the surveyor of highways, upon the application of twelve freeholders to open a new road, shall examine the same “and report thereon in writing to the Justices at their next ensuing Quarter Sessions,” describing particularly the new highways to be opened, giving at the same time public notice thereof as therein required, that is, of the report and application so to be made to that Sessions. And the section provides that if no opposition be made, “it shall and may be lawful for the said Justices”—that is, the Justices at the then next Sessions—“and they are hereby required to confirm the said report,” and to direct such new road to be opened accordingly. The section also provides, in case of

opposition, for directing a jury of twelve disinterested men to be empannelled "out of the persons returned to serve as jurors at the *said* sessions," who after hearing evidence, &c., shall confirm or annul the *said* report, "and *their* verdict shall be final." And the section then declares that such road so opened shall be and is declared a public highway.

Now in this case it appeared by the records of the office of the Clerk of the Peace, put in at the trial, that the application of the freeholders was dated 28th June, 1837, requesting the surveyor to lay out the road and report to the then next General Quarter Sessions of the Peace, and it also appeared that the public notices required by the Statute, and posted up by the surveyor, stated that he would lay the report before the Court of General Quarter Sessions of the Peace on the 11th day of July then instant, the notices being dated 3rd July, 1837. No step or proceeding whatever appears to have been taken at the July Sessions, nor does it appear that the report was then laid before the Justices. What does appear is, that at the following General Quarter Sessions of the Peace, holden on the 10th October, 1837, and by the minutes of that sessions, that the application to Lacroix and his report addressed to the Justices of the Peace at the General Quarter Sessions, to be held on the 11th day of July, 1837, was laid before the Justices at such October Sessions, and a minute made "that Mr. P. P. Lacroix having sworn to the proper notices having been affixed, and that there is no opposition to the same.—Road approved." There appears no order or direction of the Justices that the road be opened according to the report which the third section required the Justices to make.

It is therefore clear that the report of the surveyor to the July Sessions was not confirmed until the October Sessions; and the question is, whether the Justices at the October Sessions had any authority to confirm that report. This is not a question of the adjournment of the consideration of the matter from one sessions to another, a point



which has frequently arisen in questions involving the jurisdiction and authority of the Justices at the subsequent sessions, but the question resolves itself into one whether the provision of the Act of Geo. III. is obligatory or directory, and in my opinion it is the former.

The point before us arose and was discussed in the case of *Rex v. Sanderson*, 3 O. S. 103. Mr. Robinson referred to the case as an authority in his favor, but I do not look upon that case as deciding the point now before us. It is true that Sir John Robinson was rather of opinion that the Statute was directory. The other two Judges, while giving no decided opinion, thought the provisions of the Statute obligatory. The determination of the point was not necessary in that case for the judgment of the Court.

Many of the circumstances in that case were similar to those in the case we are considering. It was an indictment also for obstructing a road, which the defendant denied was a public highway. It appeared that it had been travelled by the public from 1824 to 1830, when the defendant obstructed it: that statute labor had been performed on it from 1824, and money granted by Parliament expended on it. At the trial there was produced from the records of the Clerk of the Peace the report of a road surveyor named Bristol, addressed to the magistrates assembled at the Quarter Sessions of the Peace, without date or day of filing appearing on it; the report setting out the road; also the application of the freeholders addressed to the magistrates, without date or day of filing; and that the new road was necessary, &c. Then the order or proceedings of the Quarter Sessions: viz., on the 3rd December, 1824, the matter was ordered to stand to December 11th, and on December 11th it was entered "that Bristol's report is confirmed." Several objections were taken, among them the third, that the report of the surveyor of roads does not seem to have been confirmed in the next Court of Quarter Sessions, as the Statute directs. Ninth, that it was not shewn that any order was ever made by the sessions to open the road. Sir John Robinson, before whom the case

was tried, having recommended a verdict of guilty, reserved the case for the opinion of the Court. And in giving judgment Sir John Robinson said: "As to the third objection it may admit of doubt, but I am inclined to think there is nothing in it. For all that appears the report was made in the vacation before the sessions which followed Michaelmas Term; and that sessions is the one in which it ought to have been tried if opposed, or the report confirmed if not opposed \* \* \* The confirming it, when there is no opposition, is of course; the Statute requires it, and leaves the Justices no discretion. There seems therefore no good reason for looking upon the Statute as otherwise than directory, in respect to this confirmation being made at the next sessions; but, at all events, the order was not deferred to a subsequent sessions, but was made at an adjourned sitting of the same sessions, the matter being adjourned over to that sitting, as appears by the minutes read in evidence."

I think it is apparent from the learned Chief Justice's judgment that as there was no date to the application in the report, he acted upon the assumption that the order was made at the sessions following the making of the report, and the reason assigned by the learned Chief Justice for the statute not being obligatory is, with the utmost respect for the opinion of that learned Judge, to my mind a reason why it should be held to be obligatory. In case of opposition to any such report, the parties would go prepared to oppose it at the sessions of which public notice was given that it would be laid before the Justices for confirmation, as directed by the statute, and if no step was taken to confirm it, the opponents might fairly assume the application was abandoned; but if the promoters of the road or the road surveyor could pass over that sessions, and lay the report before the Justices at a subsequent sessions, in that case the persons opposing the report being confirmed would be thrown off their guard, and have no opportunity of opposing it, or having the verdict of a jury. Macaulay, J., in giving judgment (and who agreed with the Chief Justice as

to the 5th, 6th, and 7th points, and that the verdict was not sustainable on those objections), said, "The evidence does not shew that the report was made to the *next* sessions; or that it was confirmed *thereat*; or that the road was ordered to be opened according to law. A perusal of the English cases arising under Acts of Parliament not dissimilar in terms, and passed for similar purposes, will shew that a more rigid compliance with their provisions is requisite than has generally, I fear, been supposed or practised in this Province. \* \* I question whether the third and ninth points are not also fatal, but do not pronounce any positive opinion upon them;" and he goes on to say, "When a road is required to be proved under the Act, an observance of its provisions must be shewn. \* \* The surveyor must give notice of the report to be made. It must be submitted at the *next* sessions, and if not opposed be confirmed *thereat*, and the road *ordered* to be opened."

Sherwood, J., agreed as to the fifth, sixth, and seventh points being fatal, and he also intimated his opinion that some of the other objections might be found sustainable.

Considering the opinions entertained by the Judges in that case, I cannot look upon it as one deciding the point before us, or an authority we must follow.

But when we come to examine the judgments in the case of *Bowman v. Blyth*, 7 E. & B. 26, confirmed in appeal in the Exchequer Chamber, same vol. p. 47, we see with what strictness the Courts construed a statute with a somewhat similar provision, and declared an order of Sessions acted upon for nearly twenty years invalid. There the statute authorized the Justices in Quarter Sessions from time to time to make tables of fees, &c., and after the same should have been approved by the Justices at the next succeeding general Quarter Sessions, to lay such new table before the Judges at the next Assizes. There the table was made at the Midsummer Sessions in 1837, which it was contended ought to have been approved at the next sessions, Michaelmas Sessions, 1837, whereas the approval did not take place till the Epiphany Sessions, 1838, the consideration

having been adjourned over from Michaelmas to the Epiphany. The table of fees was questioned at a trial before Campbell, C. J., in 1856. It was objected that the table of fees was not approved at the proper sessions, and that it was not a legal table. A rule being obtained, the case was argued at great length, and the Court held that the table was not duly approved. Lord Campbell, in giving judgment, said, “It is clear on the authority of decided cases—*Rex v. Justices of Wilts*, 13 East 352, and *Regina v. Belton*, 11 A. & E. 379—that in general the sessions have power to adjourn the consideration of any matter before them as justice may require, unless the Legislature has required that there should be an act done by a particular session. In that case there is a limited power given to that particular session, and the act must be done by it alone. Now then we look at the statute in this case, and we find that the Legislature have given a limited power of approval to one particular sessions only, viz., that next holden after the making the table of fees;” and after referring to the statute there, 26 Geo. II., ch. 14, sec. 1, which provides, “And after the same shall have been approved by the Justices of the Peace at the next succeeding General Quarter Sessions,” Lord Campbell proceeded, “Now the powers of approval here, \* \* are not given to the Justices generally, but to those of a particular sessions. We think the approval was an act to be done at that particular sessions, which must be completed and done by that sessions only, and here it was not completed by them, but adjourned to the next sessions. We think that, notwithstanding the general power of sessions to adjourn, which we are anxious to preserve, the Legislature have prescribed that the approval should be completed by that sessions only. \* \* This table was not so approved, and therefore we think that it is not in force.” And in the case in the Exchequer Chamber, Cockburn, C. J., said, “We are unanimous in thinking that the decision of the Court of Queen’s Bench ought to be affirmed. \* \* I quite concur in the opinion of the Court below, that the language of the Legislature, ‘next succeeding



General Quarter Sessions' cannot be interpreted to extend to any subsequent sessions. It was contended on the argument that these words were only directory ; and cases have been cited ; and it has been argued that in all acts the object of the Legislature is to be looked at in order to see whether the words are directory or not. Even if we were to adopt that test, I think there would be very good reason for supposing in this case that the Legislature intended that the table of fees should be considered by the Quarter Sessions immediately following that at which it was made ; for there are many obvious reasons why it should have been an object to have the confirmation as soon as possible after the first making. But, be that as it may, the language is clear, and if we did not give it effect, I see nothing to prevent the table of fees from remaining undealt with for any number of sessions after it was made, and yet being taken up and approved of by any subsequent sessions. I do not think we should desire to put such a construction on the Act. Even if it was desirable so to do, I think when I find the positive language 'next succeeding' sessions, that we should not be justified in doing so." Martin, B., said, "I will only add, though I do not question that in construing Acts, language seemingly positive may sometimes be read as directory ; yet such a construction is not to be lightly adopted ; and never when, as in this case, it would really be to make a new law instead of that made by the Legislature,"

Now the words used in the Statute 50 Geo. III., "the Justices at their next ensuing Quarter Sessions," are equally strong and expressive of the intention of the Legislature as the language of the Act in question in the case of *Bowman v. Blyth* ; and the principles and reasoning adopted by the learned Judges in that case may be applied with much greater force to our own Statute, when we consider the object of the application and report to be made thereon, viz., to take and otherwise affect the lands of persons through which the projected new road is to pass, and that the public notice given to those concerned is

that at that next session the matter will be disposed of. And the clear intention of the Legislature is shewn by the further provision, that if the confirmation of the report is opposed, it is to be submitted to a jury composed of the persons returned to serve as jurors at the *said* sessions, whose decision is to be final.

I refer also to the cases of *In re McCumber v. Doyle*, 26 U. C. R. 516, and *Regina v. Murray*, 27 U. C. R. 134, in both of which cases this Court adopted and acted upon the principle laid down in *Bowman v. Blyth*.

I am therefore of opinion, upon the evidence and facts stated, that the road or street in question was not duly established or properly constituted a public highway, and that the learned Judge erroneously held at the trial and directed the jury that it was so duly established by law in 1837.

The fact found by the jury that it had been used and travelled by the public as a common highway before the defendant stopped it up, some fifteen years ago, is in this case of no consequence.

In the case of *Rex v. Sanderson*, the road was used for six years, and statute labor and public money expended on it. Neither does the question of dedication, mentioned in the argument, affect this case. We know the origin of the use of the road, and, as said by Sir John Robinson, in *Sanderson's* case, "The facts repel the presumption. We see the origin of the road."

As we are of opinion that this was not a duly established road, the by-law of the town of Chatham can have no efficacy. It recites and is based upon the road being duly established by the Justices in Sessions in 1837, and is a by-law to open that road under the provisions of the 323rd section of the Municipal Act, and the notices given under that section were notices to open such road so laid out. It is certainly not a by-law to lay out and open a road over private property, if it could be said to be so, for before such a by-law could be effectual in law, it should be registered. See section 348 of the Municipal Act.

On the whole I am of opinion that the verdict cannot be sustained, and that the verdict should be entered for the defendants.

WILSON, J., concurred.

*Judgment accordingly.*

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HEFFERNAN V. BERRY.

*Sale of goods—Default in payment of balance—Re-sale by vendor—Rights of vendee.*

The plaintiff having negotiated with defendant for the purchase of a pair of horses and harness from defendant for \$400, paid \$154 in cash, and after some correspondence as to the time and mode of paying the balance, defendant sold the property, whereupon the plaintiff sued, declaring on a special count for not delivering the horses sold to him, and on the common counts.

A verdict on the common counts for the sum paid was sustained, on the ground that upon the evidence, set out below, it was not clear that any agreement was ever arrived at as to the terms and time of payment.

*Quære*, as to the plaintiff's rights, if there had been a contract. *Semble*, per *Wilson, J.*, that on tender to him of the price *after the conversion by re-sale*, the defendant on non-delivery of the goods would be liable in trover, such non-delivery being a refusal which would vest the right of action by relation; but that, at all events, the plaintiff could in some form of action recover, though perhaps not the full amount paid by him.

THIS was a cause in the County Court of the County of Bruce, tried before Gwynne, J., at the last Fall Assizes at Walkerton, without a jury.

The first count was on a special agreement, for not delivering to the plaintiff a pair of horses, sleigh, waggon, and harness, alleged to have been sold by the defendant to the plaintiff for the sum of \$400; \$154 to be paid in cash at the time of delivery, and the balance of the money upon time.

Common counts were added.

The pleas were, to the first count, a denial of the promise, and to the common counts, never indebted.

There was great contradiction between the parties as to what the bargain was; the plaintiff contending it was that he should pay \$50 in cash, and the balance by giving his note, or a chattel mortgage on the articles, if he could not

pay the cash, and the defendant contending that the whole was to be paid in cash on delivery.

The parties negotiated as to the time and mode of paying the balance of \$246, after \$154 had been paid in cash.

The following correspondence took place: The plaintiff wrote to the defendant, that waiting longer was useless, as he could not raise the money in the time the defendant spoke of. The defendant wrote, he would wait. The plaintiff wrote, he could not meet the payment sooner than five months. Defendant answered, he would wait if plaintiff gave a good endorsed note or a mortgage. The plaintiff wrote, if the defendant would not take the plaintiff's own note he, plaintiff, would give it up. He afterwards wrote, asking if the defendant would take his note or send the money back. Defendant wrote he should hold the plaintiff to his bargain, and unless he settled before ten days he should sell the team, &c., for the balance; and that the horses were now at plaintiff's expense. The plaintiff wrote, what bargain did defendant mean—would he, plaintiff, get his money if the defendant sold? Defendant wrote that the plaintiff owed him \$246, and plaintiff would get all the property realized above that sum. Defendant on the 13th May wrote the plaintiff notifying him that the horses, waggon, and harness, would be sold at noon next Saturday, on Guelph market square, by public auction.

The plaintiff forbid the sale at the time, on the ground. The defendant sold the articles for \$210.

The learned Judge found a verdict for the plaintiff on the common counts for \$159, and for the defendant on the first count.

In Michaelmas Term last, *M. C. Cameron*, Q.C., obtained a rule calling on the plaintiff to shew cause why the verdict for the plaintiff on the second count should not be set aside, and a verdict or a nonsuit be entered for the defendant, the verdict being contrary to law and evidence, and because the learned Judge misconceived the law in giving a verdict on the common counts, the money paid by the



plaintiff having been paid on a special contract, which he failed to carry out, and which the defendant was ready and willing to perform.

In this term *Harrison*, Q. C., shewed cause. The learned Judge must have found either that there was no contract ever completed, or that it was afterwards given up. In either case the plaintiff is entitled to his money again : *Hurst v. Orbell*, 8 A. & E. 107.

*M. C. Cameron*, Q. C., supported the rule. The bargain was to sell either as the plaintiff or the defendant alleged it to be. In either case the plaintiff cannot claim a return of his money, for the contract has never been rescinded. As the plaintiff did not pay the balance of the money, the defendant had the right to sell, and on such sale the defendant did not obtain sufficient to meet the balance he claimed : *Ehrensperger v. Anderson*, 3 Ex. 148 ; *Addison on Contracts*, 6th ed., 197.

WILSON, J.—The evidence would, we think, warrant the finding of the learned Judge on the second count for the plaintiff, for from the evidence it is not at all certain that the parties were ever at one upon the terms and time of payment.

If there were really a contract of sale and purchase, the property passed to the vendee; and the rule is, that although the property remained in the possession of the vendor, and he had a right of action for the price, and a lien on the property until payment made, that non-payment by the vendee did not enable the vendor to rescind the bargain : *Martindale v. Smith*, 1 Q. B. 389 ; *Couston v. Chapman*, L. R. 2 Sc. App. 254, per Lord Chelmsford ; *Bannerman v. White*, 10 C. B. N. S. 844 ; *Behn v. Burness*, 3 B. & S. 755, 756, per Williams, J.

Nor will such a wrongful re-sale by the vendor enable the purchaser to rescind the contract and to recover the money paid, or to resist paying the balance that is due : *Page v. Cowasjee Eduljee*, L. R. 1 P. C. 127, 145.

If when the plaintiff proposed to give up the contract the defendant had closed with the proposal, the contract, although the right of property was vested in the purchaser, would, by the mutual assent of the parties, have been

rescinded: *Ibid.*; and *Ehrensperger v. Anderson*, 3 Ex. 148, 158.

But here the defendant declined to put an end to the bargain which he said existed; and he declared he would hold the plaintiff liable for any loss on the re-sale. There was, therefore, no rescission. A wrongful re-sale by the vendor entitled the vendee to treat the sale as void, and to sue in trover for the conversion: *Ibid.*; and *Martindale v. Smith*, 1 Q. B. 389.

In the last mentioned case a tender of the unpaid money was made by the purchaser after he was in default, and before the re-sale, and it was held he could sue in trover.

So the purchaser may also sue in trover if the vendor who is in possession of the goods sell them before the vendee is in default: *Chinery v. Viale*, 5 H. & N. 288, 293.

Or if the vendor, who holds them as agent for the vendee and not for or in respect of his lien, sell them: *Ibid.* Or if the vendor take them out of the vendee's possession and sell them for the unpaid price: in neither of these last cases need a tender of the unpaid purchase money be made before bringing the action: *Ibid.*, and *Page v. Cowasjee Eduljee*, L. R. 1 P. C. 145.

It is not expressly decided whether trover will lie at the suit of the purchaser who is in default in his payment of the purchase money, against the vendor for re-selling after such default, without payment or tender of the price being first made, although such payment or tender is after the re-sale. It appears such a wrongful re-sale does not put an end to the contract between the parties from the previous authorities; and that being so, it would seem to follow that a tender should be made of the unpaid money before trover is brought: *Donald v. Suckling*, L. R. 1 Q. B. 585; *Holiday v. Holgate*, L. R. 3 Ex. 299, 302,—if a tender then would make any difference, though such a tender might, perhaps, be too late: *Milgate v. Keble*, 3 M. & G. 100,—though I am not satisfied on that point.

It is said in such a case the remedy of the vendee would be by an action against the vendor for an abuse of his

power of sale : *Blackburn* on the Contract of Sale 309, 310.

But here the defendant had no power of sale at all, and if trover would not lie by the plaintiff because he never was entitled before conversion to the possession, he must have the right to maintain a special action on the case which will describe the wrong done to him, and entitle him to such damages as he ought to have.

I am disposed to think it may be found that a tender of the price after the conversion by re-sale, if the vendor did not deliver the goods, and he probably would not be able to do so, that such non-delivery would be a refusal, and such refusal might vest a cause of action, the right to maintain trover, by relation. However that may be, it is clear the plaintiff must be entitled to some form of action for the wrong which the defendant has done to him. What the plaintiff's damages would be is not now the question altogether. It is probable the plaintiff would not, as of course, recover the money he had paid : *Johnson v. Stear*, 15 C. B. N. S. 330.

This question I have considered on the assumption of there having been a contract between the parties, but, as before stated, we are not satisfied there was, and as the plaintiff is certainly entitled to some compensation even if there had been a contract, we are not prepared to say any injustice has been done to the defendant.

The rule will therefore be discharged.

MORRISON, J., concurred.

*Rule discharged.*

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## ARCHIBALD V. FLYNN.

*Husband and wife—Necessaries—Evidence.*

In an action by a tradesman against a husband for the value of goods supplied to his wife, whom he has without cause turned out of his house, the question is, whether the articles furnished were really necessities, and to disprove this defendant may shew that she had been already supplied by others with similar goods.

COMMON counts. Plea, never indebted.

The case was tried before Galt, J., at the last Goderich Assizes, without a jury.

The action was brought by the plaintiff, a merchant, against the defendant for dry goods and articles of dress furnished to the defendant's wife between the twenty-second of September and the twenty-third of October, 1871, to the amount of \$174. The wife during this time was living separate from her husband, on account of his alleged ill-treatment of her, and his having turned her out of his house. Evidence was gone into to shew that she was justified in separating from her husband, and on the part of the defence that the separation was voluntary.

On the part of the defendant his counsel proposed to give in evidence that the defendant's wife had been supplied with other goods of a description similar to those sued for in this action, at the time she got the goods from the plaintiff. The learned Judge declined to receive the evidence, and a verdict was rendered for the plaintiff for the amount claimed, \$170.46.

At the close of the case it was objected that the evidence did not shew sufficient cause to justify the defendant's wife in leaving her husband; and the learned Judge reserved leave to defendant to move to enter a nonsuit.

During this term *McKenzie*, Q. C., obtained a rule on the leave reserved, and for a new trial for rejection of the evidence as above stated.

*Robinson*, Q. C., shewed cause. There was abundant evidence to justify the wife in leaving her husband. As to



the evidence rejected, the defendant offered to shew that the wife had been supplied with similar goods by other tradesmen, but not that the plaintiff had any knowledge of this, or that such other goods had been paid for by defendant. If such evidence could defeat the plaintiff's claim, no tradesman could be safe in supplying a wife under similar circumstances. In this case the wife lived with her son about ten miles from Goderich, where the defendant had his shop. It was impossible for the plaintiff to know, or even to ascertain by any reasonable enquiries, what she had at home, or by whom she might have been supplied. It will be contended that defendant can be liable only for *necessaries* supplied, but the question is what this means. In *Jolly v. Rees*, 15 C. B. N. S. 642, Byles, J., says, "The word 'necessaries' is not free from ambiguity. It may import simply things suitable to the station of the party supplied, without reference to the supply or means of supply from other sources; or it may import things not only suitable, but requisite or indispensable, because not supplied from any other source." The former meaning, it is submitted, is the proper one to apply here. As to the liability for necessities furnished to the children, see *Rawlyns v. Vandyke*, 3 Ex. 250. He referred also to *Phillipson v. Hayter*, L. R. 6 C. P. 38; *Reneaux v. Teakle*, 8 Ex. 680; *Johnston v. Summer*, 3 H. & N. 261; *Harrison v. Grady*, 13 L. T. N. S. 369; *Ruddock v. Marsh*, 1 H. & N. 601.

*McKenzie*, Q. C., contra. The evidence did not warrant the wife in leaving the defendant, and at all events she had no right to take her children with her, or to pledge defendant's credit for goods supplied for them. There may be the difficulty suggested on the plaintiff's side in ascertaining what the wife's circumstances are, but the same argument may be urged with at least equal force for the defendant. He may have already become liable to others for abundant supplies for all her wants obtained on his credit, and it cannot be left in her power to ruin him by useless and unlimited purchases. If that were the law he would be powerless to protect himself; whereas the trades-

man can always do so by declining to give the credit. At all events the authorities are clear. To render the husband liable the plaintiff must shew that the wife was living apart for a sufficient cause, and that the goods claimed for were necessities. This they cannot be if the wife wanted for nothing; and to determine this question, when disputed, it must always be relevant and material to shew what the wife already had. Such evidence was in this case improperly rejected. In *Reneaux v. Teakle*, 8 Ex. 680, it was held admissible, so also in *Hardie v. Grant*, 8 C. & P. 512. He referred also to *Clifford v. Laton*, 3 C. & P. 15; *Mainwaring v. Leslie*, 2 C. & P. 507.

MORRISON, J.—Several objections to the verdict were taken in the rule; among others, that the evidence did not justify the defendant's wife in leaving his house, and continuing to live apart from him; also that she was amply supplied with money at the time she got the goods from the plaintiff.

On reading the evidence, I cannot say that there was not evidence of ill-treatment and misconduct sufficient to justify the wife living apart from her husband, the defendant. According to the testimony of the members of their family it appeared that she was subjected to repeated acts of violence, that it was not safe for her to remain in the house with the defendant, and that he ordered her from his house, with threats of personal violence if she did not leave. Her having money or means was negatived by the testimony of her son, with whom she was taken to live.

It is, however, unnecessary to give any decided opinion on these points, as we think on the ground of the rejection of evidence there must be a new trial.

The rule of law is very clear, that if a husband turns his wife out of doors without any justifiable cause, she goes to the world clothed with an implied credit for necessities.

As is said by Blackburn, J., in *Bazeley v. Forder*, L. R. 3 Q. B. 562, "A wife, when separated from her husband in consequence of misconduct on his part rendering it im-

proper for her to remain with him, is in the same position as if he turned her out of doors, and is by law clothed with power to pledge his credit for her reasonable expenses according to her husband's degree, unless she is in some other way supplied with the means of providing them." And, referring to the rule that a husband whilst the wife resides with him chooses his own style of life, the learned Judge further said, p. 564, "But when the husband has without cause turned his wife out of doors, or by his own fault rendered it impossible for her to reside with him, the rule is changed. The husband is no longer the sole judge of what is fit, but the law gives the wife in such a case authority to pledge his credit for her reasonable expenses, leaving it to be determined by others what is reasonable."

Upon an examination of the various authorities it will be found that the question in this class of cases is, whether the articles furnished were really necessities required by the wife, in the proper sense of the term.

In *Hardie v. Grant*, 8 C. & P. 516, which was an action for the value of articles of dress furnished the wife, it being alleged she came to an hotel without necessities, Lord Abinger, C. B., said the burden of proof lay upon the plaintiff to shew that she came there without any clothes except what she wore; that unless the wife was in want of the necessities, and the plaintiff proved to the jury's satisfaction that she actually was so, they should find for the defendant, telling them also that if they found any article was really necessary the defendant ought to pay for it, There the lady's maid swore that she had plenty of clothes; and there was a verdict for the defendant.

In the preceding case in the same volume, *Emmett v. Norton*, 8 C. & P. 506, the Chief Baron said, at p. 510, "If the husband has turned the wife out of doors, and does not give her adequate means of subsistence according to his degree in life and his fortune, the law makes her his agent to order such things as are reasonable and necessary for herself, but it gives her no liberty to go into extravagance

or to pledge his credit for anything beyond what would be reasonable and necessary for her subsistence."

Now in the present case, in determining whether the defendant's wife was entitled to pledge the credit of the defendant for the large amount she purchased from this plaintiff, and that she was actually in need, it would be very material if the defendant could shew that his wife at the time the plaintiff sold her the articles did not require them, as alleged she had a few days previously obtained similar goods and articles of dress from other merchants and tradesmen.

In *Reneaux v. Teakle*, 8 Ex. 680, where the husband and wife lived in the same house, an action was brought to recover the value of articles of dress supplied to the defendant's wife during a period of fourteen months without the husband's knowledge. There the defendant's counsel proposed to prove that the defendant's wife, without his consent or knowledge, had procured within the same period other articles of dress from different tradesmen. The evidence was rejected, and a verdict entered for the plaintiff. A rule *nisi* was obtained to set aside the verdict for the improper rejection of the evidence. It was contended there that they were transactions of which the plaintiff had no knowledge. Pollock, C.B., said, at page 682, "The evidence was admissible for the purpose of shewing that the wife was already sufficiently provided with clothes, and therefore there could be no necessity for ordering the goods in question, or any implied authority from her husband to order them." Counsel in support of the rule was stopped by the Court, Pollock, C. B., saying, "We are all of opinion that the rule ought to be absolute for a new trial."

And in *Morgan v. Chetwynd*, 4 F. & F. 451, Cockburn, C. J., held, p. 456, "If it appears that the wife has a sufficiency of the articles ordered, \* \* \* the presumption of an implied authority is then rebutted." And in leaving the case to the jury the Chief Justice said, "Were these articles necessities; that is, were they things she *actually* required? \* \* \* and in considering the question you



may have regard to the supply of similar articles at the time she ordered them."

On the whole, we are of opinion that the rule should be absolute for a new trial without costs.

WILSON, J., concurred.

*Rule absolute.*

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WINNING ET AL. V. GOW AND PETRIE.

*Detinue*—"Spirits," meaning of—Old Tom gin—Inland Revenue Act, 31 Vic. ch. 8 D.—Seizure—Probable cause.

Plaintiffs manufactured in Montreal some Old Tom gin, &c., which they sold and shipped to Guelph to J. & H., no permit accompanying it. The casks were branded as if manufactured in London, England; but the invoice received by the consignees from the plaintiffs and handed to the officers, shewed that the goods came from the plaintiffs, and described the plaintiffs as distillers, &c. The defendants, as officers of Inland Revenue, seized and detained the goods for want of a permit, but subsequently, upon its being shewn at Ottawa that the goods were manufactured from spirits which had paid duty, they, by instructions, offered to release the goods on payment of the costs of seizure.

- Held*—1. That Old Tom gin was spirits, within the Inland Revenue Act 31 Vic. ch. 8, D.; for the admixture of flavoring essences, &c., did not deprive it of its character, and, whether imported or manufactured in Montreal, a permit was required.
2. That, under the circumstances set out, the defendants had reasonable and probable cause for believing the goods were being unlawfully removed, and for seizing them.
  3. That the seizure being so justified, and no permit obtained, the refusal to deliver up, except on payment of the costs, could not make defendants liable.

DECLARATION.—First count: Detinue for ten barrels of Old Tom gin, two barrels of raspberry syrup, and one barrel of ginger wine, laying special damage.

Second count: Trespass to like goods under pretence that the goods were by defendants, as officers of Inland Revenue, under the statute, seizable and forfeitable, and that they wrongfully and maliciously, without reasonable or probable cause, seized and forfeited to the Crown for infraction of such statutes, with special damage.

The third count it is unnecessary to set out, as it was given up during the trial.

Fourth count: That the goods in the first count were not chargeable with any duties of excise, customs, or otherwise, and no permit was necessary, and none could be, and not obtained; and the defendants wrongfully, maliciously, and without any reasonable or probable cause, with intent to injure the plaintiffs, seized, stopped, and examined such goods, and required the production of a permit authorizing the removal thereof, and, no permit being produced, wrongfully seized, held, and detained the same until evidence to the defendants' satisfaction should be adduced that such goods were being lawfully removed and the duty thereon had been paid, and compelled the plaintiffs to produce such evidence, and to deliver the same to the defendants; whereupon the defendants wrongfully disregarded such evidence, and converted the goods to their own use. And the plaintiffs claim a return of the said goods or their value.

Plea—General issue: per Dom. Stat. 31 Vic. ch. 8, and some fifty-three sections of that statute, and Dom. Stat. 31 Vic. ch. 51, secs. 11, 12, 14, and Consol. Stat. U. C. ch. 126. There were other pleas to the third count not necessary to refer to.

The case came on for trial at the Guelph Fall Assizes, 1871, before Wilson, J.

The defendant Gow was the collector of, and the defendant Petrie an officer of the Inland Revenue at Guelph.

The main facts at the trial were proved by the following witnesses:—From the evidence of *Jeremiah Hallett* it appeared that Jackson & Hallett, grocers and liquor dealers in Guelph (the witness being one of the firm), ordered from the plaintiffs, who carried on business at Montreal, the goods in question—ten barrels of Old Tom gin, one of ginger wine, and two of raspberry syrup: that the goods were shipped from Montreal addressed to J. & H.: that they arrived at Guelph, and a teamster brought them from the railway to the premises of J. & H.: that while the barrels were being removed from the waggon in front of J. & H.'s place, the defendant Petrie said he seized them,

on which the witness told the officer that the stuff came from Montreal, and that he expected it had paid duty. The officer said, as there was no permit, he would seize it, when he was told there were no permits for such goods. Defendant Gow came there about an hour after, and said he endorsed the seizure of the other defendant. The witness produced his invoice from the plaintiffs. This invoice was headed, "Distillery, 287 and 289 Commissioner Street, Offices and Warehouse, 389 and 391 St. Paul Street, Montreal," and shewed that "Messrs. Jackson & Hallett bought of Winning, Hill & Ware, distillers and manufacturers of cordials, Tom gins, ginger wines, &c., brandies, whiskeys, &c.," and set out the number of barrels sold to J. & H. Defendants still declined to withdraw from the seizure, and the goods were placed in J. & H.'s cellar, they giving the following receipt for them endorsed on the invoice above referred to: "Guelph, 3rd December, 1870. The within thirteen barrels, containing spirit, having been detained by officer Petrie for want of a permit, we hereby bind ourselves to deliver the same to James Gow, collector of Inland Revenue, whenever he calls upon us to do so, the same having been numbered from one to thirteen (1 to 13), and stamped with his seal, unless destroyed by fire. (Signed) JACKSON & HALLETT." The goods remained in their cellar for about a week, when they were demanded from defendant Gow on the part of the plaintiffs. Gow declined to deliver them to the plaintiffs, and then Gow was ordered to remove them from J. & H.'s cellar, which he did. J. & H. had not previously ordered any Old Tom gin from the plaintiffs. They had, however, purchased Old Tom gin from Ritchie, Ford & Jones, distillers, at Simcoe, but never obtained any permit, except once, about six months before this seizure. The witness said that he did not understand that Old Tom gin was known as spirits in the trade, but he said it was spirits, as brandy and rum are spirits, that he understood it contained 50 per cent. of spirits, with sugar and other ingredients. What he meant by spirits was spirits without any flavor, out of which he could make brandy and Old Tom gin with flavorings.

*P. B. Winning*, one of the plaintiffs, stated that they were manufacturers of various compounds : that Old Tom gin was made out of spirits, with sugar and flavoring essences : that they manufactured it for many years without a permit ; the reason being, that the revenue officers did not consider it came under their control after duty had been paid on the spirits of which it was compounded : that there was a form of permit for it, but according to the witness's idea it was not a permit : that they made Old Tom twenty-five under proof : that to all intents it was a cordial : that the duties had been paid on all the spirits, &c., out of which the gin was made. On cross-examination, he stated that they were not distillers nor rectifiers now : that they had a small rectifying apparatus on Commissioner street : that they called themselves distillers and rectifiers, though they were not so, because it looked nice in their bills to state so, and because the government made them pay for a distiller's license \$250 : that they gave up rectifying in March, 1871 : that they put a brand on the barrels they sent to Guelph "Betts & Co., London, No. 1 Old Tom Gin," and that they were in the habit of doing so for years : that it was a legitimate course of business : that it was recorded at Ottawa, and that they had authority from the Minister of Agriculture to use that trade mark. He also stated that they had four other brands besides the one branded on the goods in question. The witness also said that the department at Ottawa tendered the goods to them on paying the costs of seizure, but that he would not pay it if only one cent."

*A. J. Kent* testified that the Old Tom gin was manufactured at the plaintiffs' under his superintendence : that the ginger wine was called a temperance drink, but it had twenty-five per cent. of spirits in it, and the syrup one per cent : that spirits meant, as he understood it, spirits in its pure state.

Another witness stated that he considered spirits and Old Tom gin were different articles of commerce : that a man would not ask for spirits if he wanted brandy. He,



however, said that brandy and rum were spirits: that whiskey ceased to be spirits when anything was put into it.

Witnesses were called to shew that permits were not given for goods that were so manufactured as the goods in question, and that they were told by the officers in Montreal that the statute only applied to spirits and not to compounds, Tom gin being mentioned as one. It also appeared that the officer Gow wrote to defendants' solicitors that he was authorized to release the goods on payment of the expenses incurred, \$4.50, before this action was brought.

No witnesses were called on the part of the defendants.

Several objections were taken by the defendants' counsel, who contended that the plaintiffs were not entitled to succeed. The points were fully argued before the learned Judge, who at considerable length intimated his opinion on the several questions raised, and upon that it was agreed that a nonsuit should be entered, with leave to defendants to move against it, the Court being at liberty to deal with the case as a jury might in all respects. The learned Judge was to have power thereafter *nunc pro tunc* to certify as to probable cause or otherwise; the plaintiffs to raise any question of law, or any conclusion of fact which the law or the evidence might justify, and the Court might direct the verdict to be entered for either party and for such an amount as it might see fit.

In Michaelmas Term last *R. Martin* obtained a rule *nisi* to set aside the nonsuit, and to enter a verdict for the plaintiffs, pursuant to the leave reserved, or for a new trial, on the ground that the nonsuit was contrary to law and evidence.

During this term *Anderson*, Q. C., and *John Paterson* shewed cause.

*R. Martin* supported the rule, citing *Her Highness Ruckmaboye v. Lulloobhoy Mottichund*, 5 Moo. Ind. App. 234; *Mayor of Hamilton v. Hodsdon*, 6 Moo. P. C. 84; *Swanton v. Goold et al.*, 9 Ir. C. L. R. 234; *Ash v. Abdy*, 3 Swanst. 664; *Cope v. Doherty*, 4 Jur.

N. S. 699; *Bailey v. Harris*, 12 Q. B. 905; *Bostock v. Saunders*, 3 Wils. 434; *Hill v. Barnes et al.*, 2 W. Bl. 1135; *Sergeant v. Allen*, 29 U. C. R. 384; 2 *Burn's*, J., 30th ed., 364.

MORRISON, J.—This was an action brought by the plaintiffs, distillers and manufacturers of cordials, Tom gin, &c., in Montreal, against the defendants officers of Inland Revenue at Guelph, for seizing and detaining ten barrels of Old Tom gin, &c.

At the trial a nonsuit was entered, with liberty to the plaintiffs to move to enter a verdict for them for such damages as this Court might direct.

Mr. *R. Martin*, on the part of the plaintiffs, accordingly moved for and obtained a rule.

The principal questions raised are, whether the goods detained came under the appellation of spirits, within the meaning of the Dominion Act, 31 Vic. ch. 8, secs. 110 and 111; and if that were so, then had the officers reason to believe that the goods had been unlawfully removed.

The 110th section enacts, that "No spirits shall be removed from the distillery wherein they have been manufactured, nor from any warehouse in which they have been bonded or stored, until the duty on such spirits has been paid," &c., "nor until a permit for such removal has been granted in such form and by such authority as the Governor in Council may from time to time direct and determine; and any spirits removed from such distillery or warehouse before the duty thereon has been so paid or secured, or before such permit has been granted, shall be seized and detained by any officer of Inland Revenue," &c.

The 111th section enacts, "That any officer of Inland Revenue or Customs \* \* may stop and detain any person or vehicle carrying packages of any kind containing spirits, and may examine such spirits and require the production of a permit authorizing the removal thereof; and, if such permit is produced, the officer shall endorse the time and place of examination thereon; but if no such

permit is produced, then such spirits, if the quantity thereof be greater than five gallons, and such officer has cause to believe that they have been unlawfully removed, may be detained until evidence to his satisfaction be adduced that such spirits were being lawfully removed, and that the duty thereon had been paid, and, if such evidence be not adduced within thirty days, the spirits so detained shall be forfeited to the Crown."

It was argued very strenuously by Mr. *Martin* that, from the evidence given at the trial, Old Tom gin did not come within the denomination of spirits: that, on the other hand, it was a special compound well known in the trade under that name.

In effect, the testimony amounted just to this: Some of the witnesses thought that spirits meant pure unflavored spirits. No doubt, in one sense, that was correct. Another thought spirits or whiskey lost its character as such if mixed with any thing else; that Old Tom gin was known as a different article of commerce from that of spirits: that it was a cordial to all intents. One said that it was spirits, in the same way that brandy or rum was spirits. The general notion held by the witnesses was, that Old Tom gin, being a compound of spirits, sugar, and flavoring matter, its nature was entirely changed. I find no direct statutable definition of the word spirits, and, as said in *The Attorney General v. Bailey*, 1 Ex. 292, "in the absence, therefore, of any statutable definition, we must assume that the word is used in the Excise Act" (and in our statutes) "in the sense in which it is ordinarily understood."

If we look into dictionaries, we find gin described as a spirit made from malt, rye, &c., flavored with juniper berries, turpentine, cardamon seeds, &c.

*Worcester* says it is "A kind of ardent spirits originally manufactured in Holland from rye and malted bigg (barley), and flavored with juniper berries."

The *Encyclopædia Britannica* describes it "as a kind of malt spirit flavored with the essential oil of juniper. \* \*

The inferior spirit, sold as gin, is said to be flavored with turpentine, and rendered biting to the palate by caustic potash."

Now the mere admixture of sugar with some flavoring essence to make it more agreeable to the taste, such as it was proved Old Tom gin was compounded with, cannot, in my judgment, deprive it of its general character, any more than mixing of spirits with water to reduce its strength.

If we look for a definition of spirits, *McCulloch's Commercial Dictionary* describes it as, "All inflammable liquors obtained by distillation, as brandy, rum, Geneva whiskey, gin, &c., are comprised under this designation. The term *British spirits* is applied indiscriminately to the various sorts of spirits manufactured in Great Britain and Ireland; of these gin and whiskey are by far the most important."

And *Webster* defines spirits, as "A strong pungent liquor usually obtained by distillation, as rum, brandy, gin, whiskey, &c."

And we find the Legislature, in the Customs Acts, Dom. 31 Vic. chs. 6 and 44, defining and including under the terms spirits and strong waters, brandy, gin, &c., and other spirituous liquors of whatever strength.

It was also contended that the term "spirits" in the Inland Revenue Act only meant and was applicable to spirits distilled. I cannot accede to any such view. The second section of the Act provides that the expression "distillery" shall mean and include any place or premises \* \* \* where any spirits are manufactured or produced from any substances whatever, or by any process whatsoever." In my opinion it is quite clear that these sweeping words were intended by the Legislature to extend the statute beyond that which, without those words, it might not have covered or comprehended, viz., beyond the manufacture of spirits by distillation, rectification, &c., previously mentioned in the section. As further indicating and supporting this view of the question, the 17th section of the Inland Revenue Act provides that "the Governor in



Council may, in his discretion, authorize the manufacture in bond of such dutiable goods as he may from time to time see fit to designate, in the manufacture or production whereof spirits or other articles subject to duties of customs or excise are used, by persons licensed to that effect, and subject to the provisions herein, and to the regulations to be made by the Governor in Council in that behalf."

And by an order in Council, produced at the trial, dated 30th May, 1868, made under the authority of this section, it was provided that subject to the provisions of the Inland Revenue Act, licenses might be granted to manufacture in bond the articles therein mentioned. Among these are "gin (commonly called Old Tom) other gin and Scotch and Irish whiskey." There Old Tom gin is classed as gin and placed in juxta position with Scotch and Irish whiskeys, these latter being spirits or whiskeys to which are given the flavor peculiar, we may presume, to whiskeys manufactured in those parts of the United Kingdom.

As one of the witnesses said, if a person wanted Old Tom gin he would not ask for spirits. Neither would he do so if he wanted Scotch whiskey, but it would be absurd for that reason, to say that the latter was not spirits. And so, as remarked by the learned Judge at the trial, Old Rye is a term well known and understood among spirit dealers, and it might, on the same ground contended for by the plaintiffs, be said not to come within the term spirits.

Mr. Martin's argument went so far as to exempt all spirituous liquors or compounds not manufactured by distillation as provided by the statute, from examination by a revenue officer.

Now the various provisions in the statute for ascertaining the quantity and quality, &c., of the spirits manufactured by licensed distillers and manufacturers, are intended to apply to them, and for the prevention of frauds upon the revenue; but sections 110 and 111 extend to *all* spirits, whether so manufactured or otherwise made or introduced into the country, the object of these provisions being intended for the prevention and detection of the traffic in all spirituous liquors smuggled or illicitly made. If it

were not so one of the main objects of the Legislature would be defeated.

The giving of a name or prefix, such as Old Tom, to any one of the various drinking beverages coming within the term spirits cannot free it from the generic appellation, nor can adding some sweetening and flavor to it. Such a compound is quite distinguishable in character from one of the nature or kind which was the subject of discussion in *Bailey's* case referred to, viz., sweet spirits of nitre, a compound, it is true, compounded in a great measure of spirits and nitric acid ; but it became when so compounded an article of commerce well known, and never used or spoken of as spirits.

On the whole, I am clearly of opinion, that these goods come within the generic appellation of spirits ; for to hold otherwise would be contrary to the fair and ordinary understanding of the term, and a mere trifling with words. That being so, the next question is, had these defendants cause to believe that these goods had been unlawfully removed

The 111th section authorizes any officer to stop packages of any kind containing spirits, and require the production of a permit, and if no permit is produced, and the officer has cause to believe that they are unlawfully removed, to detain them until, &c.

Now under what circumstances did the defendants detain these goods ? The quantity of spirits was large. No permit was produced. The casks were branded, "Betts & Co., London, No. 1, Old Tom Gin." The invoice produced shewed that the goods came from the plaintiffs, who appeared to be distillers and manufacturers in Montreal, and all the further information the officers could obtain from the consignees was, that they supposed the duty had been paid.

Can it be said, under such circumstances, that the officers were not justified in detaining the goods until it was shewn to them that the goods had paid duty and were being lawfully removed ? There was no abuse of authority on their part ; they acted with no harshness to the con-

signees ; they allowed the goods to be placed in the consignees' cellar, taking their receipt for them until they obtained from their vendors, the plaintiffs, the necessary vouchers, and where they might have remained had it not been for the very unnecessary order to the revenue officer Gow to have them removed from the consignees' cellar, given by the plaintiffs or the consignees.

I may here remark that the Legislature for good reasons have made a stringent provision for the protection of the revenue and the fair trader, and have used plain words, and every prudent man in conducting his business will take care to guard against the inconvenience here complained of, and the honest manufacturer or trader ought not to complain if through inadvertence or negligence on the part of either of them, they compel an officer to enforce the provisions of the law.

It seems to me that the defendants in the absence of a permit could only assume one of two things :—that the goods, looking at the brand, were imported, and in that case were liable to customs duty, and should be accompanied by a permit if the duties were paid ; or, by looking at the invoice, that they were manufactured by the plaintiffs in Montreal under the provisions of the seventeenth section of the statute already referred to, and the order of council of the 30th May, 1868, and under the ninth sub-section of sec. 31, in that case liable to an excise duty, equal to the customs duties, payable on like articles when imported from England. And that such goods, under the seventh regulation of the 30th May, after manufacture must be placed in store rooms, &c., and cannot be removed without a permit.

It is not the province of the officer to assume, in the absence of a permit, that the duties were paid. The onus of shewing that lies on the possessor of the goods. And I think that in this case the circumstances justified the officers in requiring evidence that the duties were paid, and that the goods were lawfully removed.

It is true that the goods in question turned out not to



have been manufactured in bond, but manufactured or compounded by the plaintiffs of excisable spirits, and upon which the excise duties had been paid by them before being used in making the gin, &c.; but there is no reason to suppose that the defendants were aware that such was the case. That fact was shewn by the plaintiffs to the Department at Ottawa, to whom the detention had been reported, and upon that ground an order issued for the return of the goods.

Much stress was laid upon the testimony given by some of the witnesses, that a revenue officer said they did not grant permits for such goods, but it is no reason, because an inexperienced or indolent officer does not think it necessary, or will not take the trouble to give a permit, that other revenue officers are to be made liable to damages. The plaintiff Winning, himself, swore that there was a kind of permit for goods so manufactured, but he took upon himself to say that he did not look upon it as a permit. If he had, however, obtained the document, whatever form it might be in, the plaintiffs would have saved themselves much trouble and expense.

The object of the permit system is to prevent illicit manufacturing and smuggling, and to enable the honest trader to move without examination quantities of dutiable and excisable goods from one part of the Dominion to another.

The gin and other goods here detained were all dutiable or excisable articles, the casks being branded with the marks of Betts & Co., London, No. 1, Old Tom Gin. If imported, as the marks indicated, and which we may fairly assume it was the object of the plaintiffs to make the consumers believe, it should have been accompanied by a permit under the Dominion Customs Act, 31 Vic. ch. 6, sec. 53; if manufactured by the plaintiffs as the goods were, the place or premises where the gin was manufactured is a distillery under the Interpretation clause of the Inland Revenue Act (2nd sec. "Distillery"). And by the 110th section already referred to, no spirits shall be removed from the distillery where they have been manufactured



until a permit has been granted for such removal. So that, under any circumstances, these goods ought to have been accompanied by a permit; and, as it appears that no permit did ever issue for their removal, in my opinion the defendants were justified in detaining the goods as they did.

As to the offer of re-delivery of the goods upon payment of the \$4, the learned Judge at the trial was of opinion that, as no permit was ever obtained for the removal of the goods, the attaching the condition of paying the charges in question can be no wrong, as the plaintiffs were in the wrong themselves for want of the permit, and the Government could attach any condition they pleased when the plaintiffs had not complied with the law; the learned Judge having found as a fact that there was no permit for the removal of the original spirits from the warehouse, and it appeared these charges arose from the removal of the goods by the order of the plaintiffs from the consignees' cellar.

But, irrespective of that finding, it is quite evident that the question of detention on that account was not the question the parties came down to try. That question was, whether the officers could detain the goods under the circumstances until they were satisfied that the duties had been paid.

The rule will therefore be discharged.

WILSON, J., concurred.

*Rule discharged.*

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WRIGHT V. THE TRUSTEES OF SCHOOL SECTION NO. 3, IN  
THE TOWNSHIP OF STEPHEN.

*Common Schools—Action by teacher for salary—Want of qualification.*

A school teacher sued the trustees in the Division Court for his salary upon an agreement under defendants' corporate seal, by which they bound themselves to employ the powers legally vested in them to collect and pay him; and upon the common count for work and labor. It appeared that he was not a legally qualified teacher, but that he had taught the school during the time claimed for.

*Held*, that he could not recover: 1. Because by Consol. Stat. U. C. ch. 64, sec. 27 sub-sec. 9, as amended by 34 Vic. ch. 33 sec. 30, defendants were prohibited from giving an order in his favor on the local Superintendent, and the latter, by sec. 91 sub-sec. 2, from giving him a check upon the treasurer. 2. Because, if entitled to payment, his remedy would be by mandamus, or a special action, not by an action for the money, which was not in defendants' hands.

*Quære*, as to the meaning of 34 Vic. ch. 33 sec. 27, O.

THIS was an appeal by the Chief Superintendent of Education for Ontario, under the provisions of the 108th and following sections of the Upper Canada Common School Act, chapter 64 Consol. Stat. U. C., and sec. 27 of 34 Vic. ch. 33, O., the action in the Court below being one brought by the respondent Wright against the trustees in their corporate capacity in the fifth Division Court of the County of Huron. The statement of claim was as follows: George Wright, of the township of Stephen, &c., claims of the Trustees of school section No. 3, &c., the sum of \$217.08. For that the said School Trustees, by instrument under their corporate seal, bearing date the 23rd of August, 1869, for the consideration therein mentioned covenanted to pay the said George Wright the sum of \$320 per annum, in four equal annual instalments from that date, for his services as their teacher; and although the said Wright duly performed the agreement on his part, the said School Trustees have made default in the payment of \$217.08, being a balance of the said yearly salary, which sum the said Wright claims of the said Trustees.

At the trial, before the learned Judge of the Division Court, the claim was amended by adding a claim for work and labor done by Wright for the said Trustees at their request, and the following agreement was proved:

We, the undersigned Trustees of School Section No. 3 in the Township of Stephen, in the County of Huron, by virtue of the authority vested in us by the U. C. Consolidated School Act, have chosen George Wright, who holds a second class certificate or qualification, to be a teacher in said school, and we do hereby contract with and employ such teacher at the rate of \$320 per annum from and after the date hereof; and we further bind and oblige ourselves and our successors in office faithfully to employ the powers with which we are legally invested by the said act to collect and pay the said teacher during the continuance of his agreement the sum for which we hereby become bound, the said sum to be paid to the said teacher quarterly. And the said teacher hereby contracts with the trustees herein named and binds himself to teach and conduct the Common School in said school section according to the school law and the regulations which are in force under its authority. This agreement shall continue in force for one year from the 1st day of January, A.D. 1870, unless the certificate of the said teacher should be in the meantime revoked or annulled according to law, and shall not include any teaching on Saturdays or on other lawful holidays and vacations prescribed under the authority of the school law, but all such holidays and vacations shall be at the absolute disposal of the teacher. Given under our hands and seals of office this 23rd day of August, A.D. 1869.

(Sgd.) WM. BAGSHAW, JNO. SNELL, WM. PENTHALL.

GEORGE WRIGHT, Teacher.

The case being heard, the learned Judge decided against the Trustees, giving the following judgment:—

“This is a case of special contract between the plaintiff, George Wright, and the Trustees of School Section No. 3, of Stephen. The claim contains a statement of the contract dated the 23rd of August, 1869, for payment of \$320 in four equal quarterly payments, and claims \$207.08 as a balance of which defendants have made default in payment. The claim also contains a common count for work and labour done by Wright for the School

Trustees at their request (this count was added on application at the hearing). I cannot give the evidence in detail, as unfortunately my note book, containing the evidence has been lost, but suffice it to say, that the contract was proved, and the services duly rendered by the plaintiff under the contract, and non-payment admitted. The objection to the plaintiff's right to recover was, that he was not a legal teacher, never having obtained a certificate of qualification. I disregarded the allegation that the plaintiff was not a legally certified teacher as being outside the question substantially at issue. The services were duly rendered by the plaintiff. Defendants did not deny that they were so rendered, and the question resolved itself into this, viz.: Whether the defendants were entitled to retain and employ the services of the plaintiff without remuneration, or whether they should pay for those services out of the fund put under their control for the purpose of payment. I had little hesitation in deciding that defendants should pay, and gave judgment accordingly."

The learned Judge also added and certified that the evidence shewed that the plaintiff Wright was not in fact a legally qualified second-class teacher.

From this decision this appeal was brought.

The case was argued during this term. *Bull*, for the appellant.

*Robinson*, Q. C., for the respondent.

The statutes and authorities referred to are cited in the judgment.

MORRISON, J.—By sub-sec. 8 of sec. 27 of the Common School Act, Consol. Stat. U. C. ch. 64, the trustees of each school section are authorized and it is their duty to contract with and employ teachers for such school section, and determine the amount of their salaries.

And by the school law amendment act of 1860, 23 Vic. ch. 49, sec. 12, "All agreements between trustees and teachers to be valid and binding shall be in writing signed by the parties thereto, and sealed with the corporate seal."



And by sec. 80 of ch. 64 "No teacher shall be deemed a qualified teacher who does not at the time of his engaging with the trustees, and applying for payment from the school fund, hold a certificate of qualification as in this Act provided."

By the 27th sec., sub-sec. 1, the trustees are to appoint a Secretary-Treasurer to the corporation, who shall give security for, among other things, the receiving and accounting for all school moneys collected by rate bill, &c., from the inhabitants of the school section, and for the disbursing of such moneys in the manner directed by the majority of the trustees.

And by the 23rd section of the 34 Vic. ch. 33, Ont. "All moneys collected in any school section by the trustee corporation *shall* be paid into the hands of the Secretary-Treasurer thereof; and should the trustees refuse or neglect to take proper security from such Secretary-Treasurer, they shall be held responsible for such moneys."

And by the 9th sub-sec. of sec. 27 Consol. Stat. U. C. it is the duty of the trustees to give the teachers employed by them the necessary orders upon the local Superintendent for the school fund apportioned and payable to their school section. And as amended by the 34 Vic. ch. 33, sec. 30, sub-sec. 4, "They shall not give such order in behalf of any teacher except for the actual time during which said teacher, while employed, held a legal certificate of qualification." And by sub-sec. 2 of sec. 91 of Consol. Stat. U. C. ch. 64, the local Superintendent is to give to any qualified teacher (but to no other) on the order of the trustees of any school section, a cheque upon the County Treasurer for any sum of money apportioned and due to such section."

In the case before us the trustees and the teacher entered into the usual agreement, whereby the trustees bound themselves to employ the powers with which they were legally invested by the school act to collect and pay the teacher during the continuance of his agreement, and the suit in the Court below was brought, according to the claim attached to the summons, to recover from the trustees

\$217.08, being an alleged balance of salary under that agreement, and the learned Judge reports that the plaintiff was not in fact a legally qualified second class teacher.

I think the objection taken in the Court below, that the respondent was not entitled to recover against the trustee corporation the claim for salary, he not being a legally qualified teacher, was well founded, and the learned Judge upon that ground should have decided in favor of the Trustees.

It has been held in this Court, in *Stark v. Montague*, 14 U. C. R. 474, that the trustees cannot impose a rate for paying the salary of an unqualified teacher, and that such a teacher cannot be allowed to receive any portion of the school fund. The trustees are prohibited by the sub-sec. 9 of sec. 27 from giving such a teacher an order on the local Superintendent for his salary, and the latter, by sub-sec. 2 of sec. 91, from giving an unqualified teacher a cheque on the Treasurer.

I must say the 27th sec. of 34 Vic. ch. 33 Ont., is far from clearly expressing the intention of the framers of it. It does not point out in what way the matters in difference are to be brought and decided in the Division Court, whether as an ordinary suit, as this was, or in the nature of a proceeding before the Judge as an arbitrator, or in any other way, and when decided by the Judge it does not say in what manner or from whom any moneys are to be collected or recovered. It certainly gives the Judge no power to carry into effect any decision arrived at by him, as the repealed section provided, unless we assume that what the Legislature meant was to give the teacher the right to bring an action in the Division Court against the trustees for any matter in dispute between them, although the subject matter (as in this case) was beyond the ordinary jurisdiction of that Court. If so, and I think that is the only construction we can give to the section, then, irrespective of the objection of the plaintiff below being an unqualified teacher, there is another ground upon which I think we must allow this appeal. The action is brought by the teacher against the corporation to recover an amount due as salary. In *Quin v.*

*School Trustees*, 7 U. C. R. 137, Sir John Robinson said, "We think the action against the trustees is altogether misconceived. They (the trustees) are sued as if the money for paying teachers were in their hands, and were to be paid over by them to the teachers; but that is not so. According to 9 Vic. ch. 29 (the provisions of which were similar to the present school act) "it is the district (now local) Superintendent who is to pay the money, not the trustees, so far at least as regards that part of it which is paid by the Government. As to the portion raised by rate upon the inhabitants, that also, by the enactments of the law, goes into the hands of the Treasurer, who is merely subject to their order, and in neither case can they be liable to an action for not paying the money. They are public officers, who have only to discharge their proper duty. If they refused to make an order, a mandamus would lie against them or perhaps a special action for not making the order, but not an action for the money, for that is not in their hands." And by the agreement made with the respondent the trustees only bound themselves to employ the powers with which they were legally invested by the school act to collect and pay the teacher. They were not invested with any power to remunerate a teacher not duly qualified, which was the case with this respondent.

As to the claim under the count for work and labor done for the Trustees, which the learned Judge allowed to be added at the trial, it does not appear clear whether under that count he considered the respondent entitled to succeed. The observations at the end of the learned Judge's decision would lead me to think he did, but be that as it may, the respondent was not entitled to recover, as it is clear that there can be no binding or valid agreement between the trustee corporation and the teacher except in writing and under their corporate seal. See sec. 12 of the act of 1860.

On these grounds I think that the appeal should be allowed, that the verdict in the Court below should be set aside, and the verdict entered for the defendant with the costs of suit below.

WILSON, J., concurred.

*Appeal allowed.*



## BURY V. BRITTON AND ELLIOTT.

*Trespass to land—Public Works Act, 32 Vic. ch. 28, O.—Justification under—Pleading.*

Declaration for trespass to plaintiff's land, and throwing down the fences, hauling earth, and stopping up the watercourses thereon.

Plea, that before the commission of the alleged grievances the Commissioner of Public Works for Ontario, under and in pursuance of 32 Vic. ch. 28, O., had taken possession of said land, fences, and water courses, the same being in his judgment necessary for the construction of a certain drain, being a public work within said Act; and thereupon said Commissioner directed defendant to construct a drain to and past this land; and defendant in the construction of said drain entered upon said land so taken possession of, and in the necessary prosecution of said work threw down said fences, and deposited the earth from said ditch on the plaintiff's land, and filled up the watercourses thereon, the same being necessary for the construction of said drain, which are the alleged trespasses.

*Held*, on demurrer, a good plea; for it must be taken to mean that the Commissioner had lawfully taken possession in accordance with the Act, having complied with all requisite preliminaries.

DECLARATION, that the defendants broke and entered certain land of the plaintiff, being the westerly half of lot seven in the fifth concession of the Township of Raleigh, and land adjacent thereto, and threw down the fences enclosing the same, and scraped and hauled thereon an immense quantity of soil and rubbish, and filled up and stopped the ditches and watercourses on said lands, by reason whereof, &c.

Plea, that before the commission of the grievances in the declaration alleged the Commissioner of Public Works for the Province of Ontario, under and in pursuance of the Act passed in the thirty-second year of the reign of Her Majesty, chapter twenty-eight, entitled, "An Act respecting the Public Works of Ontario," had taken possession of the said land, fences, and watercourses in the declaration mentioned, the same being in his judgment necessary for the construction of a certain drain, being a public work within the meaning of the said Act, and thereupon the said Commissioner directed and authorized the defendant John Elliott to construct a ditch or drain, being a public work as aforesaid, running from the seventh concession by the westerly



boundary of the Township of Raleigh, and along the side road between lots six and seven, to and past the lands mentioned in the plaintiff's declaration; and the defendant John Elliott under and by virtue of such direction and authority as aforesaid, and the said Martin G. Britton as the servant of the said John Elliott, for and in the construction of the said drain entered upon the said land so taken possession of by the said Commissioner as aforesaid, and in the necessary prosecution of said work threw down the said fences and deposited the earth dug from the said ditch on the land of the plaintiff, and filled up and stopped the ditches and watercourses thereon, the same being necessary for the construction of the said drain, doing no unnecessary damage, which are the said trespasses in the declaration mentioned.

Demurrer on the grounds, 1. That the said plea, professing to avoid the said trespasses by virtue of the said Act, does not allege that the said land was wild land or uncleared land, nor shew that the Commissioner of public works acquired by contract the right to take possession of said lands, fences, and watercourses; nor allege that the fences removed were replaced so soon as the necessity of the removal had ceased, nor that the earth deposited on plaintiff's land was removed as soon as possible: that the said plea contains no justification either in the Commissioner or the defendants of the trespasses alleged in depositing soil, &c., on the plaintiff's land, in filling up his drains, or in taking and removing his fences: that the said plea is pleaded to the whole declaration, and professes to justify part only of the trespasses complained of: that the plea neither admits nor denies that the construction of the ditch therein mentioned did the injury to the plaintiff complained of in the declaration, nor that the defendants committed that injury: that the said plea does not allege or shew that the said ditch could not with proper management and care have been constructed without causing the said injury, nor that the said injury was inevitable or required for or in the prosecution of any public work or purpose, nor that it

was authorized by and in accordance with the statute in said plea referred to.

*Robinson, Q. C.*, for the demurrer. The sections of the statute referred to in the plea material to be considered are 23, 24, 25, 26, and 29 (a).

The defendants might have pleaded generally that they had lawfully done the acts complained of under the statute in question, according to *Beaver v. The Mayor, &c., of Manchester*, 8 E. & B. 44; *Brine v. The Great Western R. W. Co.*, 2 B. & S. 402; *Cator v. Lewisham Board of Works*, 5 B. & S. 115; *Bullen & Leake*, Prec., 3rd Ed., 707. But having chosen to plead specially instead of in this general form, they should have shewn a good defence in omnibus. The Commissioner had no power to take possession of the land under the 23rd section, until he had made a contract with the plaintiffs under that section, or until he had tendered the reasonable value in his estimation of the same, and given notice that the question would be sub-

(a) By Sec. 23.—The Commissioner may acquire and take possession \* of any land, \* watercourses, fences, \* the appropriation of which is in his judgment necessary for the use, construction, or maintenance of any public work, \* or for the purpose of draining, \* and he may for such purpose contract with all persons \* possessed of or interested in such lands, &c.

Sec. 24.—The Commissioner and his agents may enter upon any unenclosed or wild land, and take therefrom all \* materials \* necessary for the construction of public works, \* or may lay any materials upon any such land, &c.

Sec. 25.—Compensation to be agreed upon or awarded as thereafter set forth for such land, watercourses, &c., or for any damage thereto, shall be made, and shall be paid within six months after it has been agreed upon or awarded.

Sec. 26.—When any owner \* refuses or fails to agree to convey his estate or interest in any land \* or watercourse, the Commissioner may tender the reasonable value in his estimation of the same, with notice that the question will be submitted to arbitration as hereinafter mentioned; “and in every case the Commissioner may, three days after such agreement, or tender, and notice, authorize possession to be taken of such land, \* stream, or watercourse so agreed or tendered for.”

Sec. 29.—Whenever, in the prosecution of any public work, it has been necessary to take down or remove any fence \* of any owner or occupier of land adjoining such public work, \* the Commissioner shall cause to be replaced such fence \* as soon as the necessity which caused its being taken down or removed has ceased, &c.

mitted to arbitration under the 26th section. And if he had power to remove the fences, the defendants should, by the 29th section, have replaced the same as soon as the necessity which caused their being removed had ceased. No necessity for doing the injury complained of to the plaintiff in the execution of their own lawful work is shewn, nor that the plaintiff was bound to submit to such injury; and all interference with private rights even under Acts of Parliament must be shewn to be strictly justifiable: *Dennis v. Hughes*, 8 U. C. R. 444, 449; *Brown v. The Municipal Council of Sarnia*, 11 U. C. R. 87; *Perdue The Township of Chinguacousy*, 25 U. C. R. 61. If the defendants had the power to enter and to remove the fences, they are wrong-doers *ab initio* because of their subsequent wrongful acts in not replacing the fences, &c.

*Anderson, Q. C.*, contra. The Six Carpenters' case, 8 Co. 146 *a*, shews the defendants, if guilty only of a non-feasance, cannot be trespassers *ab initio*. The plea shewing that the commissioner *had taken possession* of the land, fences, and water-courses, sufficiently avers that he had lawfully taken possession under the statute by contract, tender of the fence, and notice to arbitrate, or in some way justifiable under the Act. The defence may be in effect the same as a plea of not possessed. If so, it is sustainable as such, or as a special plea on the facts set out.

WILSON, J.—The statute enables the Commissioner to acquire and take possession of any land, &c., which is in his judgment necessary for the use, construction or maintenance of any public work, or for the other objects specified in the Act, and for such purpose he may contract with all persons and may take conveyances. The interest or estate which the Commissioner desires I presume is to be commensurate with the purpose he has to accomplish. If the property is required for the use and maintenance of a public work he may require the permanent ownership of the property. If it be merely for the construction of a public work not upon the land required, a shorter posses-



sion or occupation of it may be all that he considers necessary.

The plea alleges that the Commissioner had taken possession of the premises in the declaration as in his judgment necessary for the construction of a public work which was to be done, and which the plea alleges the defendants did under the authority of the Commissioner, not upon the land taken apparently, but upon other land. Now that may have been a permanent or a merely temporary possession.

As respects the justification against this action for trespass, it is of no consequence which of these it was, so long as the title or possession under the statute was or is a protection to the defendants for all that was done by them.

The plea shews that *before* the time when, &c., the Commissioner had taken possession of the land, &c., in question.

If the Commissioner lawfully took possession of the premises before that time his title would be presumed to be continuing from that time forward until the contrary was shewn, and so it would appear that he had still the possession at the time when, &c.

Does it appear the Commissioner had lawfully taken possession of the land ?

In general an adverse title must be shewn to have sprung from a seisin in fee which was in existence before the time when, &c., and a derivative interest from that seisin must be shewn in the defendant, or in those under whom he justifies.

The defendants shew here no such title, but I think they shew what is quite as good a commencement of right, by shewing a possession taken under the authority of a statute, and from that title they shew a good justification for what they have done.

The possession so taken by the commissioner *before* the time when, &c., may have been before the plaintiff had any interest in the premises, or it may have been a possession taken as against and upon him. Whichever it was I presume the Commissioner still shews a good title as against the plaintiff's asserted title.



It is said the Commissioner has not shewn a good title, because the defendants do not say the Commissioner had either agreed with the plaintiff or other owner for a conveyance of the owner's estate or interest in the premises, or that he had made a tender of the reasonable value of the same, and given a notice to arbitrate respecting it, and that until he had done one or the other, and waited for three days thereafter, he had no right to take possession of the property. No doubt that is so, but I am of opinion that a possession averred to have been taken before the time when, &c., by the Commissioner under and in pursuance of the statute, implies a possession lawfully taken under the statute.

Issue joined upon the plea would compel the proof by the defendants of the necessary antecedent acts by the Commissioner to make that possession a rightful possession, for unless it were rightful it would not be a possession taken under and in pursuance of the statute. Or the plaintiff might reply the non-performance of these preliminary acts by the Commissioner.

The case of *Beaver v. The Mayor, &c., of Manchester*, 8 E. & B. 44, is rather in favor of this construction of the plea.

There is an apparent inconsistency in the plea towards the conclusion. The defendants, in the preceding parts of the plea, had referred to the lands, &c., as the lands, &c., *in the declaration mentioned*, but towards the end of the plea they say "they threw down the said fences and deposited the earth dug from the said ditch on the land of *the plaintiff*, and filled up and stopped the ditches and watercourses *thereon*, \* which are the trespasses in the declaration mentioned."

The way of reconciling these different statements is by treating the title set up as special, and merely subordinate to the general and superior title of the plaintiff. For, as before said, it does not appear that the Commissioner had taken a permanent possession, or more than such a possession as he required for the construction of the public work

which was being performed on land not the property of the plaintiff; and in that sense the land might still be called the land of the plaintiff.

Upon the whole, I think the plea may be supported as a substantial defence to the trespasses complained of, and that judgment should be given for the defendants on demurrer.

MORRISON, J., concurred.

*Judgment for defendants.*

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RYAN V. WILSON.

*Mortgage—Right of action on the covenant.*

Defendant being seized in fee of land mortgaged it to H. in 1867. In January, 1868, an attachment in Insolvency issued against him, and in May following he gave a second mortgage to the plaintiff. H. filed a bill to foreclose W., defendant's assignee in insolvency, and the Master's report in the suit treated the plaintiff as an encumbrancer. The plaintiff assigned his mortgage to H., and W. assigned the equity of redemption to G. Pending the foreclosure suit, but after the report had become absolute, G. paid to H. part of the money due on defendant's mortgage, and received an assignment from him and a release of the land from this mortgage. It was contended that H. having disabled himself from reconveying to defendant could not as beneficial plaintiff recover from him the balance of the mortgage money, but *Held*, otherwise; for defendant having conveyed nothing by the mortgage, his equity of redemption being then vested in W., could have nothing to get back.

The replication setting out the facts as above stated having been proved : *Held*, that the plaintiff should have had a verdict, without reference to its validity in law as an answer to the plea.

THIS was an action brought in the County Court of the County of Peterborough, and removed by certiorari.

Declaration : Covenant on a mortgage dated 30th of May, 1868, for payment of \$400 in one year with interest at eight per cent.

Plea, on equitable grounds, that the mortgage was given on lot 18, in the 19th concession of Harvey: that one George Harkness was a prior mortgagee of the land from the defendant : that he theretofore filed his bill in Chancery for foreclosure against one Samuel Casey Wood, who was

the assignee of the estate of the defendant under the insolvent acts of 1864 and 1865 : that the plaintiff by reason of his mortgage was made a party defendant to the Chancery suit : that afterwards, and before the conveyance of the land as thereafter mentioned from Harkness to one Andrew Griffis, the plaintiff by deed assigned to Harkness his said mortgage and the land and money mentioned therein, and that Harkness was at the time he conveyed to Griffis the holder of the said mortgage from the defendant to the plaintiff : that Wood as such assignee in insolvency conveyed to Griffis the equity of redemption in the land, of which the plaintiff had notice : that afterwards on the 8th of February, 1870, Harkness, then being the holder of the mortgage to the plaintiff, by deed of that date, and without the concurrence of the defendant, conveyed the land to Griffis, his heirs and assigns, the land being to the knowledge of Harkness of a value sufficient to satisfy in full all incumbrances thereon, and did by the same deed release the land from the mortgage from the defendant to the plaintiff.

*Replication*, on equitable grounds : that the mortgage from defendant to plaintiff was made by defendant after he had made the assignment in insolvency to Wood, wherefore no estate or interest in the land was conveyed by defendant to plaintiff by the mortgage : that the estate of defendant in insolvency was wholly insufficient to pay his liabilities, and Wood, his assignee, sold the estate of defendant in the land to Griffis, and Griffis, as such purchaser of the equity of redemption, claimed the right to redeem the land on payment of the amount due on the mortgage from defendant to Harkness alone, and alleged, as the fact was, that the mortgage of defendant to plaintiff was no charge, claim, or encumbrance on the land, and Griffis thereupon redeemed the land on payment of the amount of the mortgage from the defendant to Harkness alone, and Harkness on being so redeemed released the land to Griffis from the charge of the mortgage from the defendant to the plaintiff, and he did not release or intend to release the mortgage from the defendant to the plaintiff, and did



not grant and release to Griffis any estate or interest in the land, no estate or interest therein having vested in Griffis by the assignment to him from the plaintiff, and that Harkness did not release the land from the mortgage from the defendant to the plaintiff.

Issue.

The cause was tried at the last fall assizes held at Peterborough, before Hagarty, C. J., C. P., without a jury.

The facts were admitted as follows: 1. That the defendant was seized in fee of the land.

2. That defendant made a mortgage to Harkness in fee, on the 9th May, 1869.

3. Insolvency of defendant and vesting of his estate in Wood. The attachment issued on the 31st January, 1868.

4. That defendant made a mortgage to plaintiff in fee on the 13th May, 1868.

5. That a bill of foreclosure was filed by Harkness against Wood as assignee in insolvency on the 21st of November, 1868. The Master's report was made on the 17th April, 1869. In the report the plaintiff's mortgage was stated, and the amount due, and the priorities.

6. That Ryan, the plaintiff, assigned his mortgage to Harkness on the 21st of April, 1869.

7. That Wood assigned the equity of redemption to Griffis on the 29th of November, 1869.

8. That Harkness assigned to Griffis on the 8th of February, 1870.

9. That Harkness released to Griffis the land from the mortgage made by defendant to plaintiff.

10. That defendant's estate was not sufficient to pay his liabilities.

For the defence the defendant called *George Edmonson*, the plaintiff's attorney. He said: I was solicitor in the Chancery suit of Harkness against Wood. Griffis obtained an assignment from Harkness to redeem the land. Griffis was not a party to the suit, and took the assignment pending the suit. I remember the assignment from Harkness to Griffis (No. 9 above stated.) The Master had



made the present plaintiff a party in the Chancery suit, and reported on his claim, and the report had become absolute. Griffis, to save the expense of an application to the Court, consented to pay a portion of the plaintiff's mortgage debt on getting the release. I think the deed shews the true consideration, \$164.

The plaintiff made an affidavit in the Chancery suit on the 30th of March, 1869, stating the amount due to him to be \$294.35.

The learned Chief Justice noted, "I at present find for defendant, with leave reserved to the plaintiff to move to enter the verdict for him for \$163.30, if the Court think on the evidence and issue he can recover. It seems to me at present that the plaintiff has precluded himself from claiming on the covenant: *Burnham v. Galt*, 16 Grant 417."

In Michaelmas Term last *Hector Cameron* obtained a rule calling on the defendant to shew cause why the verdict should not be entered for the plaintiff for \$163.30, pursuant to leave reserved, on the ground that the plaintiff was entitled to succeed on the law and evidence.

In this term *Patterson*, Q. C., shewed cause. The rule in equity is, that the mortgagor cannot be called on to pay the mortgage money unless the estate he gave can be re-conveyed to him as he gave it: *Palmer v. Hendrie*, 27 Beav. 349; *Gowland v. Garbutt*, 13 Grant 578. That the defendant's interest in the land had passed to his assignee in insolvency when he made the mortgage to the plaintiff is of no consequence. He had then an interest in the land subject to the creditors' claims. But if he had in fact had no interest, he was equally entitled to get back what he gave or professed to give before he can be called on to pay. Besides, Harkness, in his Chancery suit to foreclose, treated the plaintiff's mortgage as a binding claim on the land, and after he took an assignment from the plaintiff he did convey the plaintiff's interest or release it to Griffis, and got a part of the money from Griffis. He cannot now sue the defendant for the balance of the money, because he gave

Griffis the estate which he ought to have reserved for and ought to have given or have been able to give to the defendant: *Bank of Upper Canada v. Brough*, 2 Er. & App. 95, 107.

The defendant was and is entitled to be indemnified from this mortgage by Griffis, the owner of the equity of redemption, but Harkness, the beneficial plaintiff, has discharged Griffis from all liability, and as Griffis was as owner of the equity a principal debtor in effect, and the defendant a surety only for him, the discharge of Griffis has discharged the defendant: *Rees v. Berrington*, 2 White & Tudor's L. C. 887.

*Hector Cameron* supported the rule. It is not disputed that the rule is, that the mortgagor is entitled to get back his property when he pays the debt, and that he cannot be made to pay the debt unless and until he do get back the property: *Fisher on Mortgages* 354; *Palmer v. Hendrie*, 28 Beav. 341; *Walker v. Jones*, L. R. 1 P. C. 50; *Burnham v. Galt*, 16 Grant 417. But here the defendant had no estate to get back. His equity of redemption had passed to Wood before he gave the mortgage to the plaintiff. The only value of the plaintiff's mortgage was the covenant to pay the money. The defendant never could redeem Griffis, the purchaser from Wood of the equity. The report in Chancery was erroneous treating the plaintiff as an encumbrancer on the land, and Harkness, merely to save the expense of correcting the report, and in consideration of getting part of the debt against the defendant, released the land to Griffis as against this mortgage. There was no proceeding in Chancery after the report was made. This is not at all like the case of *Bank of Upper Canada v. Brough*, 2 Er. & App. 107.

WILSON, J.—The parties, it appears to us, must have mistaken their rights at the trial. The plaintiff proved his replication, and he should have had a verdict.

Whether that replication was good in law or not was not on trial.

The plaintiff having been obliged to move to have the verdict entered for him, should have had his rule made absolute without argument; but the parties have argued the case as if the defendant had demurred to the replication, or as if he had moved on a verdict for the plaintiff to arrest the judgment.

As the case was argued before us without our observing the issue, and as the parties have discussed the law of the subject, it is better we should now dispose of it on that ground, although whatever our opinion had been upon it, the plaintiff must still of necessity have had his rule made absolute.

As to the legal rights of the parties, I cannot say I entertain any doubt in the case. In my opinion the plaintiff is entitled to a verdict and to recover the sum agreed upon at the trial.

The defendant cannot claim the right to redeem this land from Griffis on paying the plaintiff's debt.

By the mortgage which the defendant gave to Harkness, he enabled his equity to be foreclosed, and by his insolvency he lost that equity; it passed to his assignee Wood. And by the foreclosure that equity was completely extinguished, and vested in Griffis, the purchaser of both the mortgagor's and mortgagee's rights.

When the defendant gave the mortgage to the plaintiff his equity was then vested in his assignee in insolvency. He had no estate to mortgage, although he professed to mortgage it to the plaintiff. The estate which the defendant professed to give to the plaintiff never made the plaintiff an encumbrancer on the land, because all the defendant's equity had long before that been transferred to Wood. The plaintiff could not therefore have redeemed the prior mortgage and saved the foreclosure, for the rights of the mortgagor had been transferred to another, before the plaintiff got his security from the mortgagor. The plaintiff's rights were not under the owner of the equity in that case, but adverse to him.

And it seems strange now to say, and to say by way of equity, that because the plaintiff never got the security on



the land, which the defendant could not and did not give, although he pretended to give it, and although the plaintiff could by no act of his own have saved the land or prevented the foreclosure, or have established an interest in it by reason of his mortgage, and although the defendant has lost nothing by the plaintiff's acts, because he gave nothing, and although the plaintiff is the only loser by the transaction, and although these acts were done or that state of things was brought about by the defendant's own acts, default and omissions, nevertheless the defendant is discharged by a rule of equity from the payment of his debt, because the plaintiff cannot give back that which he never got and which he never could have got by reason of his security by any endeavor or action of his own.

The rule will be absolute.

MORRISON, J., concurred.

*Rule absolute.*

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#### HAND V. AGNEW.

*Promissory note—Signature by marksman—Proof of.*

Per *Wilson, J.*, the evidence in this case, stated below, was insufficient to shew that defendant was the maker of the note sued on, alleged to have been signed by him as a marksman, and the plaintiff should have been nonsuited.

The defendant, however, filed an affidavit that he was not the maker, and explaining his absence from the trial, and on this ground a new trial was granted.

This was a County Court cause, tried before Hagarty, C. J., C. P., at the last Toronto Assizes, without a jury.

The action was on a promissory note alleged to have been made by the defendant on the 24th of May, 1870, payable to the order of Samuel McKee or bearer, for the sum of \$105, on the first of January, 1871, of which note the plaintiff became the holder.

The defendant denied the making of the note.

Issue.



The note was put in. It was signed by a marksman.

*Joseph Patullo*, for the plaintiff, was sworn. He said : I am an attorney ; I live in Orangeville : I drew the note in Orangeville in my office, at the request of McKee and of defendant : I initialled it as a witness : defendant got me to date it as made at Teeswater. In cross-examination he said : I first made a note dated Orangeville : defendant said he lived near or at Teeswater, and wanted it dated and payable there : I must have known something of them or I would not have drawn the note as I did : I knew several persons named Agnew : I never was at Teeswater : I supposed he was from Teeswater : there is no person of that name at Orangeville that I know of : I will not profess to say what kind of man he was ; if they were all strangers, I would not have signed the note : I know a Samuel McKee, of Mono : I think that was he, but I won't swear positively : I think he is a small man between thirty and forty years old. I am not positive, but I think the note was given for a horse sold him by McKee : I can't say the man I saw is the man named in the writ : I would not have written the man's name for him unless he had said he could not write.

It was objected by counsel for the defendant that the plaintiff did not prove the defendant was the person who made the note.

The learned Chief Justice did not hold the evidence insufficient, saying that the defendant could rebut any presumption arising against him from it.

The verdict was for the plaintiff for \$113.78.

During this Term *Hurd* obtained a rule calling on the plaintiff to shew cause why there should not be a new trial, the verdict being contrary to law and evidence, and on grounds disclosed in affidavits filed.

The defendant made an affidavit which he signed himself, and in a very good free hand. He said he had arranged before leaving home last spring on business to have his letters forwarded to him : that they were not forwarded :

that he saw them advertised as uncalled-for letters; he sent for them and got them; he came to Toronto to see his attorney, and found a verdict had gone against him: that he could have given evidence he never signed the note: that he had no transactions with a person of the name of McKee: that he always signs his own name; and that at the date of the note he was not in Orangeville.

Mr. *Hurd*, the defendant's attorney, made affidavit that he had a person present as a witness at the trial to prove what sort of a person the defendant was and is, if the plaintiff's witnesses had given any description of him, but no such description was given by the witness called for the plaintiff, and so his, the defendant's witness, was of no service, and was not called.

*Mulock* shewed cause, and cited *The Corporation of Longueil v. Cushman*, 24 U. C. R. 602, and *Grimm v. Fischer*, 25 U. C. R. 383, and contended the defendant's counsel should have applied to have postponed the trial if not ready, and not have taken his chance of a verdict, and that the sum was not of sufficient importance to justify a new trial, which could only be on payment of costs.

*Hurd* supported the rule.

WILSON, J.—Upon the evidence I think the plaintiff should have been nonsuited, or had a verdict found against him. On the affidavits the defendant is entitled to relief, but as the plaintiff is not to blame for the abortive trial, the rule cannot be made absolute without affording the plaintiff an opportunity of getting these costs if he succeed on the next trial.

It is better for the plaintiff this should be done, than that we should enter a nonsuit or verdict for the defendant under the statute. The defendant's rule, however, does not ask us to do so.

The rule will therefore be absolute, the costs to abide the event.

MORRISON, J., concurred.

*Rule absolute.*

# STONEHOUSE V. THE CORPORATION OF THE TOWNSHIP OF ENNISKILLEN.

*Municipal Corporations—Trespass by—Justification—Drainage—Municipal Act, 1866, sec. 325—Arbitration.*

**Declaration**—First count: Trespass to plaintiff's land (lot 15, 14th concession of Enniskillen), and digging a ditch thereon. Second count: That defendants wrongfully dug a ditch in the highway near plaintiff's land, and by means thereof flooded it with water. Third count: That defendants had dug a ditch in the highway near and extending across plaintiff's land, through which water flowed; and defendants so negligently constructed and continued said ditch, and permitted so much water to run in it, that it overflowed upon plaintiff's land.

**Plea**: That, before the alleged grievances, by a by-law duly passed, defendants authorized the township engineer to enter upon said lot and survey with a view to construct a drain from the highway between it and lot 16, and to acquire the land necessary therefor: that the engineer, having made a survey, reported that it would be requisite to open a drain upon said lot, and the plaintiff was duly notified that the land specified was required for that purpose: that a copy of the by-law was served on him, and the drain dug: that after a month the plaintiff, although requested, not having appointed an arbitrator to determine his compensation, defendants by another by-law appointed W. their arbitrator, and notified the plaintiff thereof, and to name his arbitrator within a month, or that application would be made to the County Court Judge, according to the statute: that the Judge, by order reciting that the plaintiff had omitted to name an arbitrator, although the defendants had taken the necessary steps, appointed L., W. having refused to act, to determine the matter, of which the plaintiff had notice: that L. awarded \$80 to the plaintiff as compensation for his land taken by defendants for said purposes, which was duly tendered; and that in cutting the ditch defendants unavoidably injured and threw water on the lot, doing no unnecessary damage.

**Held**, on demurrer, that the plea was no answer to the third count, which complained of injury caused by defendants' negligence; but that it was a sufficient defence to the other counts, without reference to the validity of the award, for it shewed a case in which the plaintiff could only claim compensation under the statute, and the defendants had a right to enter and take the land before arbitrating.

**Semble**, however, that the plea shewed a legal award under the Act, the arbitrator's appointment, under the circumstances stated, being authorized by the statute.

## DEMURRER.

**Declaration**—First count: That the defendants broke and entered certain land of the plaintiff, being lot 15, in the 14th concession of the Township of Enniskillen, and dug a ditch or watercourse through the same, and excavated and threw up large quantities of sod and earth therefrom and thereon, &c.

Second count: For that the defendants wrongfully and injuriously did make and cut a certain ditch or watercourse



in the highway near the plaintiff's land (describing it as before), and the said ditch or watercourse so made and cut, did wrongfully and injuriously make and enter to and across the plaintiff's said land, and by means thereof wrongfully and injuriously brought upon the plaintiff's land large quantities of water, and flooded the plaintiff's land with water, whereby, &c.

Third count: That before and at the time of the committing of the grievances hereinafter next mentioned, the plaintiff was possessed of certain land, to wit (describing it), which the plaintiff cultivated as a farm, and whereas, before the time of the committing of said grievances, defendants had made and constructed a certain ditch or watercourse in the highway near to the plaintiff's said land, and extending into and across the plaintiff's said farm or land, and which said ditch or watercourse was, at the time of the committing of the said grievances, under the management and control of the defendants, and into which said ditch or watercourse defendants from time to time, before and at the time of the committing of said grievances, carried and permitted large quantities of water to flow, which said water then flowed and passed in and along the said ditch or watercourse, and across the plaintiff's said farm, of all which the defendants had notice; yet, not regarding their duty, so negligently, insufficiently, and imperfectly made and constructed the said ditch or watercourse, and at the time of the committing of said grievances kept and continued the same so negligently, insufficiently, and improperly made and constructed, and in such an insufficient and improper state, and did also at the same time so negligently and improperly manage the said ditch and watercourse, and permitted such large quantities of water to flow into the same, that heretofore, to wit, in the months of April, May, and June last, large quantities of water burst through and flooded out of and from the said ditch or watercourse into and upon the plaintiff's said farm, and flooded the plaintiff's land, whereby, &c.



Third plea : That before the committing of the alleged grievances, by a by-law duly passed by the defendants, dated the fifth of July, 1869, it was enacted, and authority was duly given for that purpose, that the township engineer should enter upon the said lot number fifteen, and survey and take the levels thereon, with a view to the cutting of a drain from the highway between lots fifteen and sixteen, in the fourteenth concession of the said township, to some point to the west thereof upon one of said lots, where a sufficient outlet might be obtained, and with a view to acquire for the use of the defendants, the said corporation, and in the exercise of its lawful power, the land necessary for the construction of said drain, &c. : that thereupon, and in pursuance of the said power and authority, the said engineer entered upon the said land and surveyed and took the levels, and reported to the defendants that it would be necessary for the public good to cut and open a drain upon the said lot in accordance with a profile or plan thereof then furnished to the defendants by the said engineer; whereupon the said line of drain was duly marked and staked out upon the said lot, and the plaintiff was duly notified that the said land, as shewn upon the said profile and plan and staked out as aforesaid, was required by the defendants, as such corporation, for the purposes aforesaid; thereupon a certified copy of the said by-law affecting the said land was duly served upon the plaintiff: that the said drain or ditch was dug and cut in pursuance of the said by-law, and in accordance with the said plan or profile: that after the lapse of one month from the time of such service, the plaintiff not having then appointed an arbitrator with a view to determine the amount of compensation he might be entitled to in respect of the premises, although requested so to do, the defendants, by a certain other by-law duly made by them, bearing date the sixth day of December, 1870, after reciting as is herein recited, enacted that John Wilson, of the Township of Enniskillen, farmer, should be and he was thereby appointed arbitrator on behalf of the said defendants, to determine and settle

what compensation the plaintiff was entitled to receive from the said corporation for the use of the said land required as aforesaid for the construction of the said drain, of which last mentioned by-law the plaintiff had due notice, and he was also notified that he was required within one month to name an arbitrator, and that if he failed to name an arbitrator within the said time, an application would be made to the Judge of the County Court of Lambton to nominate an arbitrator, according to law : that by an order of the said County Court Judge, dated the 11th of February, 1871—after reciting, amongst other things, that it had been made to appear to him that the plaintiff was interested in certain lands required to be taken for the purpose of making a drain over the said lot, and that the plaintiff had neglected and omitted to appoint an arbitrator, although the said corporation had taken the necessary steps by law required—the said Judge thereby nominated and appointed John Lowrie, of the Township of Sarnia, farmer, the said John Wilson having refused to act as arbitrator in the premises, to hear and determine the matter referred to him according to law, of which said order the plaintiff had notice. By an award in writing, under seal, duly made and published by the said John Lowrie, bearing date the 16th of March, 1871, in pursuance of the said submission and order, the said John Lowrie awarded and determined that the plaintiff was entitled to the sum of \$80 as compensation for the portion of land owned by him and taken by the defendants for the purposes aforesaid. On the 21st of March, 1871, the said sum of \$80 was duly tendered to the plaintiff by the defendants, but the plaintiff refused to accept the same. And the defendants further say, that in cutting and making the said ditch they necessarily and unavoidably injured the said lot, and threw back a little of the water on the plaintiff's land, doing no unnecessary damage, which are the same supposed grievances complained of by the plaintiff in the said counts.

Demurrer, on the grounds, amongst others, that the said

plea is pleaded to the first, second, and third counts, but is no answer in law to said third count : that the cause of action in the third count is not for taking the plaintiff's land and constructing the ditch or watercourse, as attempted to be justified, but for constructing the same in a negligent, insufficient, and improper manner, and for negligently and improperly managing the same after construction, whereby the plaintiff's land was flooded and his crops destroyed, and that said plea does not justify, or attempt to justify, such negligent, insufficient, and improper construction and management, and no by-law of a municipal corporation could legally justify the same : that the said third plea does not sufficiently justify even the trespasses in the first and second counts complained of, in this, that it does not appear that all the proceedings prescribed by the statute to be taken for obtaining an arbitration under the Municipal Act were duly and regularly had and taken by the defendants : that it is not alleged that, as a matter of fact, the plaintiff neglected for a month to appoint an arbitrator, nor is it made to appear that the County Court Judge had authority to appoint a sole arbitrator, nor is it alleged that the plaintiff had any notice of the arbitration, or attended thereat, or had any opportunity to attend the same : that at all events the alleged award only provides, or assumes to provide, compensation for the land taken, and not for the damages sustained by the plaintiff by reason of the negligent, insufficient, and improper construction and management of the said drain or watercourse.

*John Paterson*, for the demurrer, cited *Brown v. Municipal Corporation of Sarnia*, 11 U. C. R. 87; *Anderson v. Great Western Railway Company*, *Ib.* 126; *Perdue v. The Township of Chingacousy*, 25 U. C. R. 61.

*Harrison*, Q. C., contra, cited *Hodgson v. Municipality of the Township of Whitby*, 17 U. C. R. 230; *McGillivray v. Millen*, 27 U. C. R. 62; *Crewson v. Grand Trunk Railway*, *Ib.* 68; *Murray v. Dawson*, 19 C. P. 314; *The Corporation of the County of Welland v. Buffalo and Lake Huron Railway Company*, 30 U. C. R. 147; *Rowe v. Corporation of Rochester*, 29 U. C. R. 590.



WILSON, J.—The third plea is no answer to the third count, which is for injury sustained by the plaintiff while the ditch or watercourse was under the management and control of the defendants, by reason of the defendants having negligently, &c., constructed the ditch, and by their keeping it negligently, &c., constructed, and negligently, &c., managing it, so that large quantities of water burst through and from it upon the plaintiff's land and damaged it; while the plea sets up a justification and a compensation awarded to the plaintiff "for the portion of land owned by him and taken by the defendants for the purposes aforesaid," that is, for the construction of the drain upon the plaintiff's land. There must therefore be judgment on demurrer for the plaintiff on the third plea, so far as it relates to, and is pleaded to the third count.

As to the other two counts :

Under the 325th section of the Municipal Act, the council is required to "make to the owners of real property entered upon, taken, or used by the corporation in the exercise of its powers in respect to roads, \* \* or to drains and common sewers, due compensation for any damages necessarily resulting from the exercise of such powers, beyond any advantage which the claimant may derive from the contemplated work."

By this enactment the municipality may enter upon, take, or use the land before making compensation.

The clause then continues: "And any claim for such compensation, if not mutually agreed upon, shall be determined by arbitration under this Act."

The plea shews a case which properly comes within the provisions of this section, and it appears to me the only recourse which it is open for the plaintiff to take is by requiring an arbitration under the statute. It is of no consequence, then, whether the defendants' plea shews a full and regular procedure taken by the defendants to have an arbitration, or not, because the reference is not a preliminary and prior proceeding to be taken by the defendants before they have the right to exercise their powers



in entering, taking, and using the plaintiff's land for the purposes in the plea mentioned.

If it were necessary the defendants should have arbitrated before entering, then, however regular their proceedings to obtain an arbitration may have been, they would afford no protection for what is complained of, because the defendants would have entered on the plaintiff's land before they had procured the reference.

It is really of no importance, in that view, whether their proceedings have or have not been regularly taken since the time they set about to procure an arbitration, excepting for the purpose of shewing that the wrongs complained of by the plaintiff should not only be prosecuted before another tribunal, but that before that tribunal they have been legally and finally adjudicated upon.

If in that view it is of any moment to shew a good adjudication, then, in my opinion, they have shewn it, but, as before stated, I do not think it is. It is enough for them to shew that, whether the claims made have or have not been adjudicated upon, they are not entertainable by this Court.

Still I have no objection to say why the defendants have shewn a valid reference and award.

The defendants passed a by-law which affected the plaintiff's rights: they served him with a proper copy of it. The plaintiff did not appoint an arbitrator within one month thereafter. The defendants then passed a by-law appointing an arbitrator, and they gave notice to the plaintiff that he was required to name an arbitrator within one month, and that if he failed to do so, an application would be made to the Judge of the County Court to nominate an arbitrator according to law. The plaintiff did not name an arbitrator. The defendants' arbitrator refused to act, and the defendants applied to the Judge to name an arbitrator, which he did, who made his award.

Now the Judge is empowered, on the application of either party, to nominate an arbitrator without the limits of the municipality in which the property is situate (which

he did do) in three cases :—1. If the owner neglect to name an arbitrator within seven days after receiving notice to do so. 2. If the two arbitrators (of course, that is where each party appoints an arbitrator) do not, within seven days after the nomination of the last of the two arbitrators, agree on a third arbitrator. 3. If an arbitrator neglect or refuse to act. Here it appears the owner did neglect to name an arbitrator within seven days after notice, and here also an arbitrator did refuse to act.

There must therefore be judgment on demurrer for the defendants to the third plea, so far as it applies to the first and second counts, and, as before mentioned, for the plaintiff on the demurrer to the plea so far as it applies to the third count.

MORRISON, J., concurred.

*Judgment accordingly.*

## KERR V. THE BRITISH AMERICA ASSURANCE COMPANY.

*Insurance—Action by assignee in insolvency—Magistrate's certificate of loss.*

An insurance policy required persons sustaining loss to produce a certificate under the hand and seal of a magistrate, stating (among other things) that he was acquainted with the character and circumstances of the assured or claimant, and that he verily believed that he, by misfortune, and without fraud or evil practice had sustained loss and damage on the subject insured to the amount certified. The action was brought by K. the official assignee in insolvency of W., the insured, who became insolvent after the loss.

The certificate stated that the magistrate was acquainted with the character of W., and that he verily believed that the claimant, K., had, as such assignee, without fraud or evil practice, sustained loss and damage by the said fire to the extent of \$2,500.

*Held*, clearly insufficient, for it was consistent with the magistrate's belief that the fire occurred through W.'s fraud or evil practice, and it did not state that K. had sustained the loss on the subject insured, but only by the fire.

A coroner is a magistrate who may give such certificate.

THIS was an action on a fire policy, in which a verdict was entered for the plaintiff at the Toronto winter assizes, 1872, before Wilson, J., by consent, with leave to the

defendants to move to enter a verdict for the defendants on the seventh plea, which traversed the giving of a proper certificate, if in the opinion of the Court the certificate produced, which was furnished to the defendants, was in accordance with the twelfth condition endorsed on the policy.

That condition, after setting out that persons sustaining loss should forthwith give notice thereof, &c., proceeded : " They shall also produce a certificate under the hand and seal of a magistrate or notary public most contiguous to the place of the fire, and not concerned in the loss, stating that he has examined the circumstances attending the fire, loss, or damage alleged ; and that he is acquainted with the character and circumstances of the assured or claimant ; and that he verily believes that he, she, or they have by misfortune, and without fraud or evil practice, sustained loss and damage on the subject assured to the amount which the magistrate or notary public shall certify in his own words at length."

The insured was one S. H. White, who became insolvent after the loss occurred, and the present plaintiff was the official assignee. The certificate was as follows :—

" I, Henry McNaughton, of the village of Erin, do hereby certify (1) that I am not in any way interested in the loss by fire of the store and stock of goods of Samuel H. White, of the said village of Erin, or concerned therein : (2) that I have examined the circumstances attending the fire and alleged loss or damage : (3) that I am acquainted with the character of the said S. H. White : (4) that I verily believe that the claimant, John Kerr, of the city of Toronto, official assignee of the estate of the said S. H. White, has, as such assignee, sustained loss or damage by the said fire to the extent of twenty-five hundred dollars : (5) that the said claimant, John Kerr, has, as such assignee, without fraud or evil practice, sustained the said loss and damage.

" (Signed) HENRY MCNAUGHTON,

" *Coroner.*"

It was admitted that the coroner who signed the certifi-

cate was not in the commission of the peace, nor a magistrate otherwise than he might be as coroner.

In Hilary Term *J. H. Cameron*, Q. C., obtained a rule *nisi*, in pursuance of the leave reserved.

During this term *McMichael*, Q. C., shewed cause, citing *Crowley v. Agricultural Mutual Assurance Association of Canada*, 21 C. P. 567; *Ross v. Commercial Union Assurance Co.*, 26 U. C. R. 552, 559; *Fitzgerald v. Gore District Mutual Fire Insurance Co.*, 30 U. C. R. 97.

*Cameron*, Q. C., and *Duggan*, Q. C., supported the rule.

MORRISON, J.—I am of opinion that the rule must be made absolute.

The certificate states that Mr. McNaughton examined the circumstances of the fire and alleged loss or damage, and that he is acquainted with the character of White, who was the assured, and the person, as appears by the declaration, that suffered the damage and loss, and who was interested in the property at the time of the fire; but Mr. McNaughton does not follow up his knowledge of White's character by stating his belief that White, by misfortune, and without fraud or evil practice, sustained the loss or damage on the subject insured or the amount of such damage; and the certificate is perfectly consistent with a knowledge of White's character, and with his, McNaughton's, belief that it was not by misfortune, but by his, White's, fraud or evil practice, that the fire and loss occurred, and so evading the most essential part of the certificate required by the company.

Then, so far as the official assignee is concerned, he only certifies that he, Kerr, as such assignee, has sustained loss or damage by the said fire to the amount mentioned in the certificate; but it is defective in not stating that such loss or damage was, as the condition requires, on the subject insured. Again, that statement is also quite consistent with Kerr, as assignee, suffering that amount of damage *by the fire*, and yet that not an article covered by this policy was destroyed.



The obtaining of a certificate containing the matters mentioned in the twelfth condition, is an engagement on the part of the insured or claimant before he can apply to the company for indemnity, and the assignee, standing in the place of the assured, cannot call on the defendants until the condition is complied with. A certificate omitting the most essential particulars, as this does, viz., the magistrate's belief that the loss was by misfortune, and that the amount of the loss was on the subject insured, both of which he ought to have satisfied himself of in his examination into the circumstances of the fire, cannot be considered such a certificate as the condition requires. To hold that this certificate is a substantial compliance with it, as was argued, would be to render nugatory this one mode which the company have adopted for their protection against frauds. Mr. Cameron very properly conceded, on the argument, that a coroner is a magistrate.

The rule to enter a verdict for the defendants will be absolute.

WILSON, J., concurred.

*Rule absolute.*

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IN RE FAIRBAIRN AND THE CORPORATION OF THE  
TOWNSHIP OF SANDWICH EAST.

*C. S. U. C. ch. 93, secs. 6, 7—Survey under—Motion to quash by-law—  
Acquiescence of applicant.*

Sec. 6 of C. S. U. C. ch. 93, authorizing the county council to apply to the Governor to cause a concession line to be surveyed, applies only where such line was not run in the original survey or has been obliterated. Where, therefore, it appeared that there were in fact two lines clearly traceable, the question being which was the original line, and the surveyor decided this upon conflicting evidence: *Held*, that such survey was not binding or conclusive, and that a by-law of the township adopting it must be quashed.

*Held*, also, that the acquiescence by the applicant in the line thus adopted (which was a highway) could not be urged against the application, other interests than his, both public and private, being affected.

Sec. 7 directs that the surveyor shall so draw the line as to leave each of the adjacent concessions of a depth proportionate to that intended in the original survey. The depth of the concession on the north side of the line in question lay from north to south, and the concessions on the south extended in depth from east to west, so that the depth of that to the north only would be affected by the position of the line. *Semble*, that this would not prevent the application of the statute.

IN Michaelmas Term last *Harrison*, Q. C., obtained a rule calling on the municipal council of Sandwich East to shew cause why their by-law No. 18, entitled, "A by-law to establish and authorize the opening and making, according to the survey made by Frederick L. Foster, Esq., P. L. S., of such part or parts of the roads or concessions of L'Assumption, in the Township of Sandwich East, County of Essex, Province of Ontario, Dominion of Canada," passed on the 12th of December, 1870; and why by-law No. 22, entitled, "A by-law to confirm the appointment of Jeremiah M'Carthy, and to authorize him to remove all fences and obstructions on the line of road in rear of the third concession of L'Assumption," passed on the 20th of May, 1871, should not be quashed for illegality, with costs, upon the grounds:—

1. That the survey of Frederick L. Foster was not authorized or warranted by anything contained in C. S. U. C. ch. 93, and C. S. C. ch. 77, or by any other statute.

2. That in the said survey the lines were not so drawn as to leave each of the adjacent concessions of a depth proportionate to that intended in the original survey.

3. That the said survey was made without evidence, without a proper inquiry as to evidence, and without a due regard to the original depths of the lots on each side of the road intended to be surveyed.

4. That the said survey is in other respects illegal and void.

5. That the by-laws are in excess of the powers conferred on municipal councils; and on grounds disclosed in affidavits and papers filed.

By-law No. 18 recited a resolution of the council passed in January, 1870, adopting a petition to the Government of Ontario, praying that certain concessions in Sandwich East be surveyed, and that the Warden be authorized to sign, seal, and forward the petition to the Governor in Council: That Frederick L. Foster, Esquire, P. L. S., was appointed by the Lieutenant-Governor to survey, and that he had surveyed under such appointment the lines of road or concessions in front and rear of the third concession of Sandwich East, under the directions of the Commissioner of Crown Lands of Ontario; and that the council had passed a by-law to provide for the expense of surveying and marking by permanent boundaries the said concessions. It was then declared that the line of road or concession line between the second and third concessions of L'Assumption, in Sandwich East, and the line of road or concession in rear of the third concession and between the third concession and the English survey, so surveyed and marked by permanent stone boundaries or monuments by P. L. S. Foster, under the appointment and directions aforesaid, and in pursuance of the Act C. S. C. ch. 77, shall be, and the said survey and marking of the said lines between the second and third concessions, and the third concession and the English survey, by the said P. L. S. Foster, is, and the same is hereby adopted and declared to be the true line or lines of roads between the said second and third concessions, and between the third concession and the English survey, and they are each established as the lawful highway or road for public travel.

By-law No. 22 recited that it had been represented that the line of road in rear of the third concession of L'Assumption had been obstructed by fences being built across it, and it confirmed the appointment of Jeremiah McCarthy, who had been authorized to remove the obstructions, and it authorized him to remove all such obstructions.

Numerous affidavits were filed both for and against the rule which it is considered unnecessary to set out. The applicant was stated to be the owner of lot 17, in the sixth, and parts of 17 in the seventh and eighth, and part of 18 in the eighth concession of Sandwich East, being part of what is called the English survey, which land is bounded on the north by the allowance for road in rear of the third concession of said township, commonly called the French survey, this allowance separating the two surveys. His complaint was, that Mr. Foster's survey made in May and June, 1870, ran the line of road to the south of what he alleged had always been considered the allowance for road in rear of the third concession, thereby cutting off a portion of his land from the English survey and throwing it into the third concession of the French survey; and this survey he alleged was made by Mr. Foster without leaving each of the adjacent concessions of a depth proportionate to that intended in the original surveys.

Mr. Foster, in his report, in referring to the line between the third concession and the English survey, said: "In locating this line I experienced some difficulty. It was represented to me by certain parties that the old blazed line shewn on the plan and in the field notes lying to the north of the line as finally located by me was the original allowance for road in rear of the third concession. But, after carefully comparing and weighing the evidence I had before me, I could arrive at no other conclusion than that the weight of evidence was preponderating in favour of the line I had indicated by stone monuments as being that laid down in the original survey of the third concession. In laying down this line I accepted the line shewn by Oliver L'Esperance in front of his lot on the town line



between Sandwich and Maidstone as the position of the original line there. I also accepted the spot pointed out by Dennis O'Keefe about two miles and three-quarters to the west of Oliver L'Esperance's boundary, as being the true boundary at that point. Producing a line through these boundaries pointed out by L'Esperance and O'Keefe to the "Huron Church Line," I found it to come out only  $65\frac{1}{2}$  links south of the undisputed boundary there. I then tested the boundaries pointed out by G. LeDuc and F. Dumouchelle, and producing a line through them I found that it would not come out at known boundaries either on the Huron Church line, or at the town line of Maidstone. The position of this trial line is shewn on the field notes of survey.

Next I traced up the old blazed line north of the travelled road to a point a little beyond the "Pelette Road," in order to define its position. I found it straight and well blazed, but, from the testimony I had received, evidently not a well established line.

I do not presume to account for the existence of this old blazed line, or to suggest any theory in regard to it, and I must not omit to mention, as a noticeable circumstance, that by admitting this old blazed line to be the original allowance, the third concession would be nearly the same depth at the Huron Church line and the town line of Maidstone, whereas by the other proved line the concession is found to be deeper at the town line by several chains than at the Huron Church line. In adopting the L'Esperance and O'Keefe boundaries, my established line passes along the centre of a travelled road leading from the town line of Sandwich, and opened, as I am informed, at different places as long as thirty-five years ago. For the most part it is a well made and long used thoroughfare.

On the other hand, there is opened from the gravel road, for the distance of about three-quarters of a mile, a road claimed by some to be located on the original allowance there, and to be taken as such in connection with the old blazed line indicated on the plan. I am informed this road

has been opened out a long time. It is not a turnpiked road like that opened out from the town line of Maidstone.

Assuming the line I have established to be the true and original allowance for road in rear of the third concession, LeDuc and Dumouchelle, as well as the Messrs. Fairbairn and Mr. Hanly, will be found, I understand, to have enclosed in their holdings portions of lands lying within the third concession. I urged these parties, who were apparently interested in proving the old blazed line to be the original allowance for road, to produce all the evidence they could in regard to it; and having no prospect of receiving further evidence than what had been furnished me, I proceeded to make up my judgment upon the evidence before me, and I have located the line where the concession line originally surveyed appears to have been placed by the first surveyor, after having given the matter my best as well as anxious consideration."

The important part of the instructions given to Mr. Foster by the Commissioner of Crown Lands was, to make a survey in accordance with the C. S. U. C. ch. 93, and to make diligent search for, and adhere to, the lines drawn and posts planted in, the original survey or legally established by the boundary commissioners.

Various acts of acquiescence on the part of the applicant in the correctness of the road as established by the survey and by-laws were alleged, as that he had been paid by the municipality for ditching done on it; and it was stated that he had bought the land in dispute for a trifling sum, \$20, from a person who at one time owned the lots in the French survey, the seller assuring him that he had no claim to them, and that he took a quit claim deed only at his own risk.

In this term *Robinson, Q. C.*, shewed cause. It is contended by the applicant that the survey was made without the authority of the statute C. S. U. C. ch. 93, sec. 6; for that such a survey can be made only where the line was not originally run, or where it has been obliterated. The

township council made application for the survey, and the Court will not try the validity of the survey on affidavits on a motion to quash the by-law adopting it, unless for defects on the face, and there are no such defects here. In such cases the Court will exercise a discretion whether to set aside a by-law, or not. Everything with respect to this survey has been done in strict accordance with the statute.

It is also objected that the survey does not leave to each of the adjacent concessions a depth proportionate to that intended in the original survey, as directed by the statute, Consol. Stat. U. C. ch. 93, sec. 7. But here that provision in the statute cannot apply, for the adjacent concessions run in different directions, and the survey, therefore, could not affect the depth of them both. To the north of this concession line, in what is called the French survey, the concessions extend from west to east, numbering from the north. To the south of the concession line, in the English survey, the concessions extend from north to south, numbering from the west. Any change therefore which affects the depth of the third concession will affect the width, not the depth, of the concessions to the south of the line. But that is no reason why the statute should not apply at all. The proportionate depth is to be given according to that which was intended to have been given in the original survey, and this Mr. Foster has done in his survey. The applicant is not entitled to have the discretion of the Court as to quashing the by-laws exercised favourably for him, because he bought the lands in the English survey in respect of which he now questions the by-laws for \$20, taking a release of a former owner's right, although the former owner told him he had no right to sell, as he had already sold the land to other persons, and because the applicant heretofore claimed the pieces of land now in dispute as part of the third concession, and he has done statute labour and other work on the road which has since been established by Mr. Foster.

*Harrison*, Q. C., supported the rule. Acts of acquiescence should not be set up against the applicant on such



a motion as the present, because it is a strictly legal right. If this were an election motion, another elector might be substituted for him, but this cannot be done in the present case, and if the by-laws remain in force unquestioned for a year, they cannot be vacated at all. This survey is not authorized by the statute. It is not within the statute, because the adjacent concessions, as it is admitted, cannot have their respective depths apportioned, by reason of their running in different courses. The sixth and seventh sections of the Act C. S. U. C. ch. 93, must be read together, and unless effect can be given to them both the survey cannot be made, or cannot be binding.

The statute extends, too, only to cases in which the lines were not originally run, or, having been run, have since become obliterated. That is not the case here. The original line was run, and it is not obliterated. There are in fact two lines, both distinctly marked, and the question is, which of these two lines is the original and proper one. But that is not a matter within the provisions of these sections of the statute, nor is it a matter for a surveyor to settle at all. Nor can the township council or the Government change the original survey by any by-law or order, or adoption. The question is one for a jury only. He referred to *Tanner v. Bissell*, 21 U. C. R. 553; *Re Scott and The Corporation of Peterborough*, 25 U. C. R. 453, 26 U. C. R. 36; *Re Scott and The Corporation of Harvey*, 26 U. C. R. 32; *The Corporation of Peterborough and The Corporation of Smith*, 26 U. C. R. 40. A by-law will not be permitted to stand in the way of private legal rights: *Burritt and The Corporation of Marlborough*, 29 U. C. R. 119.

WILSON, J.—The principal by-law, No. 18, moved against was passed to establish the survey made by Mr. Foster of the concession line between the second and third concessions, and the concession line in rear of the third concession. The motion, though formally against the whole by-law, is directed by the affidavits wholly against the survey made of the line in rear of the third concession.



The applicant owns land on that line, but he does not, so far as we see, own land on the other concession line, nor does he appear to be interested in it in any way. The rule will therefore be discharged so far as it relates to the survey of the line between the second and third concessions.

As to the line in rear of the third concession, it appears that one McNiff, in 1795, surveyed the first, second, and third concessions, in what is called the French survey, in Sandwich East, and that he did lay out and blaze an allowance for road in rear of the third concession, between it and what has since been called the English survey; and that Burwell laid out the English survey in 1824.

There are two blazed lines in rear of that concession, extending from the town line between Sandwich West and Sandwich East at the gravel road, and extending easterly from there beyond or as far, at any rate, as the applicant's land extends to the line between the eighth and ninth concessions, and both are very old blazed lines, and both are said to be the original or McNiff's blazed line by many persons. These two lines opposite the applicant's land are about three chains apart. The applicant contends that the northerly line is the original one, while Mr. Foster adopted and established the southerly one. It appears also that at the Huron Church line in Sandwich West there is an undisputed monument, from which easterly to the line between the fifth and sixth concessions of Sandwich East there is an old travelled road on what is the northerly blazed line. At that point there is a jog to the south as far as the southerly blazed line, and on that line the road, an old road, is thence continued easterly to the Maidstone town line.

[The learned Judge then enumerated the different reasons in support of each of these lines as being the original line, and proceeded.]

The survey has been carefully and excellently well made by Mr. Foster, and, I must add, impartially made too, for he has stated the facts which bear against

his opinion and conclusion as fully and fairly as he has stated those for him.

It is very obvious, on referring to the statute—which recites that in several townships “some of the concession lines, or parts of the concession lines, were not run in the original survey performed under competent authority, and the surveys of some concession lines, or parts of concession lines, have been obliterated, and owing to the want of such lines the inhabitants of such concessions are subject to serious inconvenience,” and which enacts that an application may be made to the Governor, requesting him “to cause any *such line* to be surveyed,” &c.—that this concession line is not within the enactment of the statute.

It is not the case that this line was *not run* in the original survey, as far west, at any rate, as the Lauzon road, and perhaps to Maidstone, nor is it the case that the *survey has been obliterated*. As far as the Lauzon road it plainly appears there were and are two old blazed lines and each one is maintained to be the original line. The lines were distinctly traceable; there was no obliteration. One or the other is apparently the original road allowance, and the real question is, which of these two lines is the true and original one. Nobody pretends that as far easterly as the Lauzon road an original allowance for road was not laid out, and that it is well marked and easily to be traced. That being so, it is plain this provision of the statute does not apply. It becomes a question for judicial trial and settlement, and not for governmental arrangement; although, if the statute did confer power upon the Government to interfere in such a case, it might neither be dangerous nor inconvenient, and it would probably be a very great saving from expensive and continued litigation. The decision which the surveyor has come to in the present case, and which the Government has adopted, would not perhaps, under all the circumstances, be an unfair settlement, but, as the law now stands, it is not a legal and binding one.

The case of *Tanner v. Bissell*, 21 U. C. R. 553, which

was referred to, is quite satisfactory on the point ; but we should have had no difficulty in coming to the same conclusion independently of it.

If there had been no other objection to this case coming within the operation of the statute than that the third concession lay in depth from north to south, while the concessions in the English survey adjacent to it lay extended in depth from east to west, I think there would have been no insuperable bar to relief being given as fully as if the adjacent concessions had been each projected on the same course.

I think, however much the conduct and acquiescence of the applicant may be urged against him on a legitimate trial of the right, that it cannot be properly used against him on an application to remove a by-law passed contrary to law, where other interests are affected, both public and private, than those of the applicant alone.

What Mr. Foster has done has been not to make a line when and where no line had been run, nor to discover the original line if possible, and if he could not, to lay down another one according to the statute in place of, the obliterated line, but to decide judicially, upon conflicting evidence, which of two lines was the proper one, it being admitted that an original line had been run, and that it was not obliterated.

We regret the trouble that has been taken respecting the line, for it has all ended so far unprofitably and uselessly. But on the facts before us it is plainly a question for judicial determination, or for the legislature.

The rule will be discharged so far as it relates to the survey between the second and third concessions, and be absolute as to the residue.

The parties will, under the statute, get their costs according to the result of this motion.

MORRISON, J., concurred.

*Rule accordingly.*

## CLARKE V. MCKAY.

*Sale of mill site—Contract—Construction—Amendment—Defective title—Possession—Right to recover back purchase money.*

Plaintiff declared on the common counts, and on a special agreement by defendant to sell to the plaintiff certain land together with two mills and a head of water, for the purpose of working said mills, of twelve feet, and to convey the same to the plaintiff at defendant's expense.

The defendant, on the 4th April, wrote to the plaintiff, "There is about twelve feet of a fall of water, and it might be raised to twenty feet if required." And in answer to a letter from the plaintiff asking for some explanation, he again wrote, on the 3rd May, "The twelve feet fall is at the oat mill, and can be raised to twenty feet, or any height required." It was proved that the whole fall to be had upon the property was less than eight feet.

*Held*, that the contract was proved as to the head of water; for though in his first letter the fall was said to be "about twelve feet," it was described in the second as "the twelve feet fall," and in both it was said that it could be easily raised to twenty feet.

*Seemle*, that though defendant was not expressly to make a deed and at his own expense, yet the fact that he would not allow the plaintiff to have it prepared, but insisted on its being drawn by his own lawyer, was some evidence that this was the bargain.

The Court, however, allowed an amendment by striking out this allegation, and inserting an averment (which would excuse the not making and tendering a conveyance), that defendant could not make a title and give a right to raise the water twelve feet, this being clearly in accordance with the evidence.

The plaintiff had gone to the mill on a Thursday without defendant's knowledge, and remained till Saturday. On the Tuesday following he returned and stayed a day or two, not using the mill, but mending a leak in the mill gate; and he gave it up because the title could not be made.

*Seemle*, that such possession, not taken by the agreement nor sanctioned by defendant, could not prevent the plaintiff from recovering back under the common counts what he had paid on account of the purchase money.

DECLARATION. First count, on a written agreement that defendant should sell to the plaintiff lot eighteen in the fifth concession of Kinloss, together with an oatmeal mill and a saw-mill and other buildings on said premises, together with a head of water for the purpose of working said mills, of twelve feet, at the price of \$2,700, of which the plaintiff paid to the defendant \$200 before any breach of the agreement by the defendant, and none of the other payments were due before the happening of the said breach, and the defendant was to have executed to the plaintiff at his own expense, within a reasonable time after the payment of the said \$200, a proper conveyance of the said premises. Averment of all conditions having been ful-



filled, &c., yet that the defendant, although a reasonable time had elapsed before the commencement of the suit, did not execute to the plaintiff such conveyance nor complete the said purchase on his part, whereby, &c.

Common counts were added.

Plea, 1. To first count, denial of promise. 2. To the common count never indebted. 3. To the common counts, set-off. 4. To the first count, that defendant did not agree to execute at his own expense to the plaintiff a conveyance of the said premises as alleged. 5. To the first count, that defendant was ready and willing to perform the agreement, and to grant and convey to the plaintiff the land and premises according to the terms of the agreement, and offered to do so, but the plaintiff refused to accept the said grant and conveyance, and repudiated his contract, and refused to carry out the same.

Issue.

The cause was tried at the last Fall Assizes held at Goderich, before Gwynne, J., without a jury.

The plaintiff and several witnesses were examined on his behalf. No evidence was given for the defendant.

The defendant's letter of the 4th April, 1870, to the plaintiff stated that "there is about twelve feet of a fall of water, and it might be raised to twenty feet if required, for there are high banks on both sides of the creek."

The plaintiff wrote to the defendant on the 22nd of April referring to the previous letter of the fourth of April, "I do not understand by your letter whether the twelve foot fall is on the site you mention for a grist-mill, which could be raised to twenty feet; or is the fall of the oat-mill twelve feet and could be raised to twenty feet.

To which the defendant on the 3rd of May answered: "You have mentioned you did not understand how I mentioned about the twelve feet fall. The twelve feet fall is at the oat-mill, and can be raised to twenty feet, or any height required; there is a good fall on either side the mill."

There was a good deal of correspondence put in and read, but none bearing on this part of the case.

A receipt, relied on by the defendant as shewing the bargain between the parties, was also put in, and was in the following words :

“ Kincardine, 6th September, 1870.

“ Received from W. Clarke, Esq., the sum of two hundred dollars, on account of purchase money of all his mills and farm property on lot eighteen, fifth concession, Kinloss, and the balance of twelve hundred dollars to be paid as follows : \$300 on the first day of December, next, and the balance of \$900 in 9 equal annual instalments of \$100, with int. to become due and be made on the first day of January, A.D., 1872. The said Clarke to pay mortgage on premises to amount of \$1,300 ; and if mortgage exceeds same, then excess over \$1,300 to be paid by me and deducted out of \$1,200 balance. I am to have the use of the barn on the premises until the first day of February next, and any lumber that I may have on the premises I am to have the right to remove such at any time during sleighing next winter.

(Signed) “ DONALD MCKAY.”

The evidence as to the plaintiff's taking possession was in effect, that the plaintiff went to the place on a Thursday, and he opened the window and went in, without the defendant's knowledge, to get lodgings for the night, and stayed there till Saturday ; then he entered on the Tuesday after, and stayed a day or two. He did not use the mill. He made some improvement in the mill gate. It leaked, and he made it tight. And he gave up the place because the title could not be made.

It was objected at the trial that the special count was not proved, because there was no evidence the defendant was to make a deed at his own expense ; and because the term as to a twelve feet fall was stated absolutely, while the defendant only engaged to give “ *about* twelve feet fall.”

The learned Judge held that the special count was not proved.

A surveyor proved that the whole extent of the fall on the property was seven feet, nine inches, and to raise it to twenty feet the water would have to be dammed back half the length of and on the adjoining lot.

The learned Judge was of opinion the plaintiff reasonably understood the defendant's letters to mean that the head of water should be twelve feet, and it was clear the defendant could not give such a fall, and that the whole of

the bargain had in effect fallen through; and that the plaintiff was entitled to the return of his deposit money on the common counts.

The verdict was entered generally for the plaintiff, for \$212, damages.

In Michaelmas Term last, *Harrison*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside as to the first count, and a verdict be entered on it for the defendant, or a nonsuit entered, pursuant to the leave reserved at the trial, and pursuant to the Law Reform Amendment Act, upon the ground that the plaintiff at the trial failed to prove the agreement in that count set out : that the agreement, if any, could only be shewn by the letters which passed between the parties ; that it was no part of the contract (if any) that defendant should warrant a head of water, for the purpose of working the mill, of twelve feet, or that within a reasonable time after the payment of \$200, the defendant should execute, at his own expense, to the plaintiff a proper conveyance of the premises ; that under the contract (if any) it was the duty of the plaintiff to have tendered to the defendant the conveyance for execution, and he did not do so.

And why, pursuant to the Law Reform Amendment Act, the verdict as to the remaining count should not be set aside, and entered for the defendant, upon the ground that the learned Judge should have so entered it, for the reason that upon the facts proved the plaintiff was not entitled at law to recover from the defendant the sum of \$200 as a debt.

Or why, if the plaintiff is so entitled, the verdict should not be set aside and entered for the defendant for the sum of \$78 under the plea of set-off, on the ground that the learned Judge should have so entered it, for the reason that the contract (if any) found at the trial was still in law subsisting, and under it the plaintiff on the first of December last was indebted to the defendant in the sum of \$300, being an amount in excess of the plaintiff's claim.

In this term *S. Richards*, Q. C., shewed cause. It was shewn that the defendant would not have a deed prepared by Mr. McPherson, the lawyer to whom the plaintiff went, and who he wished should draw it; but the defendant would not agree to anybody but Mr. Ross, his own lawyer, drawing it. And the meaning of that was, that the defendant had undertaken to prepare the deed by his own professional man, for he would not allow the plaintiff to have it prepared by his lawyer. But as it was admitted by defendant he could not make a title to the fall of twelve feet, it was not necessary for defendant to make or tender a conveyance: *Sugd. V. & P.*, 14th ed., 241, 364; *Seaward v. Willock*, 5 East 198, 202; *Lowndes v. Bray*, 1 *Sugd. V. & P.* 373, 14th ed.; *Bamford v. Shuttleworth et al.*, 11 A. & E. 926, 933.

The count should not have stated that the defendant was to prepare a deed at his own expense. It should have alleged a waiver by the defendant, of the rule or condition that plaintiff should prepare a deed, which would be supported by the evidence and the count would then be right by striking out the allegation that the defendant was to do so at his own expense. It was said the plaintiff had taken possession of the property, and had paid the \$200 after he had seen the property, and so he could not terminate the contract; but the case of *Snyder v. Proudfoot*, 15 U. C. R. 532, shews that possession taken and abandoned under such circumstances would entitle the vendee to recover on the common counts, or on the special count for not giving a deed when the vendee had no title.

*Harrison*, Q. C., supported the rule. The plaintiff cannot recover on the first count, for he did not prove a contract by which the defendant was to convey to him a fall of twelve feet of water for the mill. The agreement was for *about* twelve feet.

Up to the 15th of July the letters shew there was no bargain concluded.

The receipt of the 6th of September, states what the



bargain was. The plaintiff went into possession of the mill and used it. He was there by his own choice, not at the defendant's request.

As to what is a representation and what a warranty : *Behn v. Burness*, 3 B. & S. 753; *Riach v. Niagara Mutual Insurance Co.*, 21 C. P. 464.

The contract was not completed till the plaintiff came to this country and examined the property, and paid the deposit. The receipt for the money is really the contract, and nothing else should be admitted into it : *Anderson v. Pacific Fire and Marine Insurance Co.*, L. R. 7 C. P. 65; *Noble v. Spencer et al.*, 27 U. C. R. 210; *Chamberlain v. Smith*, 21 U. C. R. 103; *Elmore v. Hind*, 24 U. C. R. 136; *Emery v. Parry*, 17 L. T. N. S. 152.

Nothing is said as to which of the parties was to bear the expense of the deed. It was therefore the plaintiff's duty to have drawn it, and to have tendered it for execution ; he did not do so : *Smith v. Doan*, 15 U. C. R. 634. He cannot, therefore, sue on the special count.

Nor can he recover on the common counts, for both parties cannot be re-instated in their former position : *Hunt v. Silk*, 5 East 449 ; *Beed v. Blandford*, 2 Y. & J. 278 ; *Blackburn v. Smith*, 2 Ex. 783. The defendant is entitled also to the benefit of his set-off.

The plaintiff should not be allowed to amend, for he did not ask to do so at the trial.

WILSON, J.—The contract was, I think, well described as a twelve feet water fall. The defendant's letter of the 4th of April described it as *about* twelve feet, and it might be easily raised to twenty feet if required. His letter of the 3rd of May describes it, without any qualification, as *the twelve feet fall*.

I understand by these two letters that the defendant had then a working fall at his mills of twelve feet, *which could easily be raised to twenty feet if required*. The latter words, which are in his April letter, are absolute, and are without any qualification.

These letters are, I think, important parts of the contract. It is impossible to conceive of a mill property being sold in which the motive power was not one of the most important elements of the bargain.

The fall of less than eight feet, which is all that can be raised upon the property in question, is very far short of that which the defendant asserted he had, and professed to have the right to sell.

The defendant was not expressly to make a deed at his own expense, but the fact that he would not allow the plaintiff to prepare the conveyance by his own professional man, and his insisting that it should be done by his, the defendant's, own lawyer, is some evidence that the defendant was to prepare the deed and at his own expense.

If, however, that allegation be struck out, the plaintiff would require to aver that the defendant could not make a good title and convey in fee simple to the plaintiff the right to raise the water to a height of twelve feet and to the height of twenty feet if the plaintiff required it, &c.; in which case he would shew a good excuse for not making and tendering a conveyance.

That amendment should be made now, for it is plainly in accordance with the agreement and with the undisputed facts of the case.

Then as to the common count. The rule certainly is, as Mr. Harrison has maintained, that it cannot be resorted to unless the special contract has been entirely put an end to; and that cannot be unless both parties can be replaced just where they were and as they were at first. And that cannot be when the vendee has taken possession of the property, for then he has had a partial benefit from the contract. That was the case in *Hunt v. Silk*, 5 East 449, and *Blackburn v. Smith*, 2 Ex. 783.

The possession in the two cases referred to was a part of the special agreement. Here it was never taken by the agreement at all, nor sanctioned by the defendant.

I am not prepared to say that such a possession can by possibility stand in the way of the contract being

determined, and the parties replaced where they were. At any rate by amendment of the first count, as before stated, the plaintiff is entitled to retain his verdict, in which case there can of course be no recovery on the common counts.

The rule will be absolute to amend the special count as before stated, if the plaintiff desire it, and to enter his verdict on it; or to enter the verdict for defendant on the special count, if the plaintiff do not amend it, and leave the verdict remaining for the plaintiff on the second count; and that the rule be drawn up accordingly, and be discharged in all other respects.

MORRISON, J., concurred.

*Rule accordingly.*

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### ARCHBOLD V. WILSON.

*Building contract—Liquidated damages or penalty.*

Defendant contracted under seal to do all the carpenter's and joiner's work required in the erection of two dwelling houses for the plaintiff, and covenanted that the work should be ready for the lathing by the 10th of October, and ready for the painter by the 10th of November, and should be fully completed by the 24th of November under a penalty of \$20 a week as liquidated damages for every week beyond the said time the said works shall remain incomplete.

On the trial Wilson, J., sitting without a jury, construed the contract as one for a penalty, and computed the damages at \$14.86 a week.

On motion to increase the verdict, *Morrison*, J., held that the \$20 must be regarded as liquidated damages. *Wilson*, J., adhered to his ruling at the trial. *Richards*, C. J., being absent, and the Court thus equally divided, the rule dropped.

THIS was an action on a building contract, by which the defendant contracted, by an indenture under seal, to execute and perform all the carpenter's and joiner's work required in the erection and finishing of two dwelling houses for the plaintiff.

The covenant on the part of the defendant was, "that the said works shall in all things be performed and according to the plans, &c., after the manner therein referred to,

and shall be ready for the lathing by the 10th day of October next, and shall be ready for the painter by the 10th day of November next, and shall be fully completed by the 24th of November next, in all things, to the entire satisfaction of," &c., (the architect) \* \* "under a penalty of \$20 a week, as *liquidated damages*, for every week beyond the said time the said works shall remain incomplete."

The case was tried before Wilson, J., at the last Winter Assizes at Toronto, without a jury.

The learned Judge was of opinion that the claim for damages was one arising under a penalty, and not as liquidated damages, as it applied to two houses; and he entered a verdict for the plaintiff for \$88.78, finding eight weeks delay, at \$14.86 a week, and he allowed the defendant \$29.60 on account of some extra work. He reserved leave to the defendant to move to increase the damages to \$20 a week as liquidated damages.

In Hilary Term last *Harrison*, Q. C., obtained a rule *nisi* on the leave reserved.

During this term *O'Donohoe* shewed cause, and contended that the contract contemplated a penalty and not liquidated damages, and that the defendant had been delayed by the interference of the plaintiff. He cited *Papps v. Melville*, 16 U. C. R. 124; *Holme v. Guppy et al.*, 3 M. & W. 387.

*Harrison*, Q. C., supported the rule. The only question is, whether the contract intended liquidated damages or a penalty, and the authorities clearly shew that in a case like this liquidated damages should be construed to be intended. He cited *Fletcher v. Dycke*, 2 T. R. 32; *Reynolds v. Bridge*, 2 Jur. N. S. 1164; *Duckworth v. Allison*, 1 M. & W. 412; *Gilmor v. Hall*, 10 U. C. R. 309; *Legge v. Harlock*, 12 Q. B. 1015; *Gaskin v. Wales*, 9 C. P. 314; *Fisher v. Berry*, 16 C. P. 23; *Reilly v. Jones*, 1 Bing. 302; *Leighton v. Wales*, 3 M. & W. 545; *Green v. Price*, 13 M. & W. 695; *Rawlinson v. Clark*, 14 M. & W. 187; *Galsworthy v. Strutt*, 1 Ex. 659; *Reynolds v. Bridge*, 6 E. & B. 528; *McPhee v. Wilson*, 25 U. C. R. 169.



MORRISON, J.—I am of opinion that the rule should be absolute. The contract provides for the full completion of the works by a certain day, under a penalty of \$20 as liquidated damages for every week beyond the time the works shall remain incomplete.

The case of *McPhee v. Wilson*, in this Court, 25 U. C. R. 169, is an authority in favor of the plaintiff. That case contains all the principal authorities on the subject.

No doubt the cases are conflicting and unsatisfactory, but it seems to me that this is just one of those cases where the character of the works and the express agreement of the parties point to only one intention, viz., that, if the works are not completed by the day named, the contractor shall pay the \$20 a week for so long as they shall remain incomplete.

The true object of the covenant is to spur the contractor to finish his work in time to allow other contractors or workmen to proceed with the other works. There is nothing unreasonable in such a stipulation, and the damage arising from a breach of such an agreement is essentially uncertain and incapable of being computed accurately.

It is not only the damages the plaintiff may suffer from being prevented from getting his houses finished at the time specified, but his possible liabilities to other contractors by their being prevented by delays in finishing their works.

As said by Erle, J., in *Mercer v. Irving*, E. B. & E. 563: "The meaning of the words being clear, on what ground are we to depart from it? According to my observation, no rule can be more important than that of giving effect to the intention of the parties."

In the case of *Cruix v. Aldred*, 14 W. R. 656, which was a case of a building contract, the clause was: "The works shall be begun on Monday, the 6th of February, and be completed to the carcase of the new building. The shop front and the shop walls, all the cases and fittings, within two months, and the whole works completed within three months therefrom, subject to a penalty of £20 per week

that any of the works remain unfinished after either of the stipulated periods have expired." It was there contended to be only a penalty, as the non-completion might be caused by any one of a number of things of various degrees of importance, the rule being that where the sum is payable on the omission to perform any one of several things, such sum is considered a penalty, and the damage actually sustained must be proved. On the other side, it was contended that it must be liquidated damages, and was payable on the omission to perform one thing only, or the last thing which had to be done to complete the work, whatever that might be. Erle, C. J., said: "We think the sum of £20, which is to be deducted on the non-completion of the work within a certain period, must be considered to be liquidated damages, and should not be construed in a nugatory manner as amounting to a penalty." The rest of the Court concurred.

I must say I can see no distinction in principle between that case and the one before us, and in my opinion the damages should be increased to \$130.31.

But, as my brother Wilson adheres to the opinion he held at the trial, the rule drops.

## REGINA V. FLANNIGAN.

*Certiorari—Summary conviction—Reducing evidence to writing.*

*Seemle*, that it is the duty of a magistrate, at a trial under his summary jurisdiction, to take the examination and evidence in writing.

Where a magistrate, on a summary trial, took no written depositions, but the conviction returned to a certiorari set out the evidence: *Held*, in the absence of anything to shew that there was any other or different evidence given, the return must be taken to be a true and full statement.

*Seemle*, that had there been proof of any other or different evidence given, the magistrate might have been required to return it or to amend the conviction by setting it out.

IN this Term *Blevins* obtained a rule, calling on the Police Magistrate of Toronto to shew cause why an attach-

ment should not issue against him, for not making a proper return to the writ of *certiorari* granted in this matter, on the twelfth of April last, and directed to the Police Magistrate, commanding him to return to this Court the conviction order and proceedings in the Police Court against the said Flannigan, for the disobedience of the Police Magistrate in not obeying the requirements of the said writ, and in not making a return to the same; or why the return made to the Court should not be quashed, or be amended on such terms as to the Court may seem just.

The *certiorari* required the magistrate to send "the said conviction or order and proceedings in the Police Court against Patrick Flannigan as fully and entirely as it remains in our said Police Court."

The return was of "the record of conviction or order and certain proceedings of which mention is made in the same writ."

The proceeding returned began:—

PROVINCE OF ONTARIO, <i>County of York,</i> <i>City of Toronto,</i> <i>To Wit:</i>	}	Be it remembered that, on the twenty-fifth day of March, in the thirty-fifth year of the reign of our Sovereign Lady Victoria, &c., ——— came before the police magistrate, John Barton Yeomans, and then and there, by his informa- tion and complaint in writing, &c., (setting out the same,) which was to the effect, that Patrick Flannigan, of the City of Toronto, grocer, on the 22nd of March, did, at and in the City of Toronto, sell spirituous, fermented, manufactured, and intoxicating liquors, without the license therefor by law required, and contrary to the statute.
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Then it set out the summons to Flannigan to appear to answer the charge, and his appearance thereto, and his plea of not guilty to the same, and an adjournment of the hearing to, and the appearance of both parties on, the twenty-eighth of March.

The evidence of the witnesses was then given.

*Thomas Mason*, a witness duly sworn, deposed that he, accompanied by one Stephen Burns and by one A. J.

Jones, on the twenty-second of March, 1872, did visit the grocer's store of and kept by the said Patrick Flannigan, on the south side of Queen Street, west of Brock Street, in Toronto, and did therein buy from the mother of the said Flannigan, who was attending to said store and selling goods therein, one half-pint of whiskey, for which he paid to the said mother of Flannigan the sum of eight cents.

*Stephen Burns* was also sworn, and deposed to the same effect.

*A. J. Jones* was also sworn, and deposed to some of these matters as before stated.

It was then set out that Flannigan, in his defence, called his mother as a witness, who was duly sworn, and deposed that, on the twenty-second of March she was attending in the said store of her son Patrick Flannigan; that liquor was kept in said store for sale; that she did not sell any liquor at any time to either Mason or Burns, but she would not swear she did not sell liquor to any one on that day; that she attended to the store of her son Patrick Flannigan, and sold goods to customers at his request, but she could not remember any one to whom she sold on that day, or what articles or goods she did sell.

Then followed the adjudication by the Police Magistrate, finding Flannigan guilty of the offence charged upon him by the information.

Then it proceeded in substance as follows:—And the said Patrick Flannigan is on this, the twenty-eighth of March aforesaid, at the City of Toronto, convicted before me, the said Police Magistrate, for that he, the said Patrick Flannigan, on the twenty-second of March aforesaid, at and in his grocer's store, in the City of Toronto, did, by and through his mother, the said Catherine Flannigan, then and there being his, the said Patrick Flannigan's, servant and agent, in the premises, sell spirituous and intoxicating liquor by retail, to wit, whiskey, in the quantity of one half-pint, to one Thomas Mason, at and for the sum of eight cents, without having the license therefor by law required, and contrary to the provisions of "The Tavern



and Shop License Act of 1868.' This being adjudged to be a first offence against the said Act by the said Patrick Flannigan.

And I adjudge the said Flannigan for his said offence, under the said Act, to forfeit and pay the sum of \$50, to be paid and applied according to law under the said Act, and also to pay to the said Yeomans the sum of \$3.85 for his costs in this behalf, And if the said several sums be not paid forthwith, I order that the same be levied by distress and sale of the goods and chattels of the said Flannigan; and in default of sufficient distress, I adjudge the said Flannigan to be imprisoned in the common gaol of the City of Toronto for the space of thirty days, unless the said several sums, and all costs and charges of the said distress and of the commitment and conveying of the said Flannigan to the said gaol, shall be sooner paid.

"Given under my hand and seal, &c.

(Signed) A. McNABB, P. M." [L.S.]

The order for the *certiorari* was granted on the following papers.

An affidavit by Patrick Flannigan, stating his conviction, and proceeding in effect as follows:—"I never sold liquor during the whole course of my life either with or without a license, and I never kept either a tavern or grocery, or place for selling or disposing of liquors at any time or in any place. I am a butcher by trade, carrying on the same on Queen Street, (in Toronto,) and in the adjoining house to that in which I carried on my said business a grocery store was kept, but I say that I had no interest therein or connection therewith at any time; hereto annexed is a true copy of all the papers relating to the said conviction that could be found in the office of the Clerk of the Court, as I have been informed and believe, and I do not believe there is any other record or proceeding relating to the said matter, except those whereof the annexed information, deposition, and decision, are true copies."

The paper said to be annexed to the affidavit was the ordinary printed information, stating the complaint to have been made by Yeomans before the Police Magistrate

on the twenty-fifth of March, 1872, on oath "that he is informed and believes one Patrick Flannigan, Queen Street West, did, in the said City of Toronto, within the past twenty days, to wit, on the twenty-second day of March, 1872, sell or barter spirituous, fermented, manufactured, or intoxicating liquors without the license therefor by law required."

The following is a copy of the rest of the document referred to :—

"Police Court, 27th of March, 1872.

"Thomas Mason, of the City of Toronto, cabinet maker, sworn, states.

"Adjd. until 28th March, 1872.

"(Signed) A. McNABB, P. M."

"Police Court, 28 March, 1872.

"Catharine Flannigan (defts. mother) sworn : I never sold any liquor to either of the wits., Mason or Burns, in my life ; we keep liquor for sale ; I will not swear that I did not sell liquor on the 22nd of March, 1872.

"Fined \$50 and costs, or 30 days in com. gaol, with hard labour in default of payment.

"(Signed) A. McNABB, P. M."

In this Term *Hurd*, for the Police Magistrate, shewed cause to the rule. He read and filed the following affidavit by the Police Magistrate :—

"That in making my return to the writ of *certiorari* \* \* \* I did, as I believe, fully comply with the terms of said writ and the requirements of law in the premises, as I was not by such writ required to return anything, except 'the conviction or order and certain proceedings,' and I did return the conviction or order, and therein set forth all the proceedings had in the premises : that on the hearing of the charge before me, I did not reduce the evidence of the witnesses to writing, or take any regular written depositions from them, nor (as I understand the law to be) do I require to take any evidence in writing whatever, but only to hear such evidence and determine thereupon in a summary manner ; that such being the circumstances, I am unable to make any fuller return to said writ than I

have done, and I submit that I have done all that the said writ required of me to do."

And he contended the writ had been fully complied with.

*Blevins*, contra. The papers filed shew the proceedings had not been sent up, but a record of them, and that record does not correspond with the actual proceedings. The record details evidence which was not given before the Police Magistrate. The original record should have been brought up, for the Court will not quash a conviction unless the original is brought up: *Regina v. Brickhall*, 12 W. R. 909.

WILSON, J.—The proceeding returned is the conviction on the common law form, setting out the whole proceedings. It might have been drawn up in the general form given in the Dominion Act of 1869, ch. 31, sec. 50, and the appendix, omitting everything excepting the adjudicatory part.

The Tavern and Shop License Act of 1868, sec. 25, under which these proceedings were had, permits that to be done.

The magistrate has returned the whole of the evidence. He says, in his affidavit, he did not reduce the evidence at the hearing to writing, or take any regular written depositions from the witnesses, as he believes he is not required by law to do so.

In *Paley* on Summary Convictions it is said the examination of the witnesses should be taken formally in writing.

*In re Rix*, 4 D. & R. 352, and *Rex v. Warnford*, 5 D. & R. 489, shew that a mandamus will lie to magistrates to amend the conviction, by setting out the evidence on which it is founded as nearly as possible in the words used by the witnesses. And no doubt there would be a difficulty in doing so if the evidence were not taken down in writing.

The Dominion Act, 32–33 Vic., ch. 31, sec. 39, does not say how the examination shall be taken. The magistrate,

if the defendant do not admit the truth of the information, is to proceed "to hear the prosecutor or complainant, and such witnesses as he may examine, and such other evidence as he may adduce in support of his information or complaint, and shall also hear the defendant and such witnesses as he may examine, and such other evidence as he may adduce in his defence, and also hear such witnesses as the prosecutor or complainant may examine in reply, if such defendant has examined any witnesses or given any evidence other than as to his (the defendant's) general character."

And by sec. 41, the justice having heard what each party has to say, and the witnesses and evidence adduced, shall consider the whole matter, &c.

Where a statute required that the party should "give in his examination upon oath," it was held that such language required the examination to be in writing: *Thurtell v. The Hundred of Mutford*, 3 East 400.

I should be inclined to say—from the difficulty if not the impossibility of giving the words of the witnesses correctly, especially after the lapse of some time, short or long, and which words as they are used, or as nearly as possible as they were given, the Court is entitled to have returned to it, if it call for the same—that it was the duty of the magistrate to take the examinations and evidence in writing.

The absence, illness, or death of the magistrate would, of course, present an insuperable obstacle to the evidence being obtained if it were called for by the Court, if it were not taken down in writing at the time it was given.

Here, however, the magistrate says he did not take any regular depositions, and, as a fact, he has returned the evidence in the conviction at length, which we must presume to be the true and full evidence which was given, so long as there is nothing shewn to us to the contrary.

The mere note, of part of the evidence of one witness, and of the names of the other two witnesses on the information, filed on this application by the defendant Flanni-



gan, does not shew there was any other evidence than the magistrate has returned in the conviction. It corroborates rather what the magistrate has said, that he took no regular depositions in writing.

The paper filed by the defendant shews, if anything, that there was no evidence given by two of the witnesses, and much less evidence given by Mrs. Flannigan than appeared in the conviction.

But we cannot take the fact to be that there was no other evidence given than appears on the information, in the face of the conviction, and when there is nothing stated to the contrary.

From the cases referred to, of a mandamus having issued to require the full and correct evidence to be returned, it appears the Court will call for and examine the evidence, if necessary, not for all purposes, but to shew "there was no jurisdiction in the justice." Per Lord Campbell, C.J., in *Re Burley*, 3 E. & B. 607, 614: that is, such evidence from which the justice was warranted in concluding the fact to be as he had found it. If the Court see by the evidence there is jurisdiction, they must stop there—they cannot use it for any other purpose. They have no jurisdiction to review the determination; it cannot be enquired whether it was right or not: *Ibid.* p. 619; see, also, *Regina v. Bolton*. 1 Q. B. 66; *Brown v. Cooking*, L. R. 3 Q. B. 675; *Ex parte Vaughan*, L. R. 2 Q. B. 114. It may be the evidence might be called for and looked at to see whether there was any evidence at all to sustain the conviction.

It appears to me the rule must be discharged, for the Police Magistrate has returned the conviction and proceedings. And the return cannot be quashed.

As before stated, there is no affidavit filed shewing there was any other or different evidence given before the Police Magistrate than he has returned. If there had been, he could, I think, be required to return it or to amend the conviction by setting it out.

The evidence as given does support the finding, and that is all the evidence which we have before us, and none other is suggested to have been given, nor is it stated there is less

given than is returned to have been given ; or that it was different in any respect.

The most that is shewn is, that the Police Magistrate did not note in writing fully the evidence as given ; but that is not the subject of any complaint before us, if it be a cause of complaint at all.

The rule must be discharged with costs.

MORRISON, J., concurred.

*Rule discharged.*

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DUMBLE (Assignee in Insolvency of Daniel Brooke) v.  
WHITE.

*Insolvent Act of 1869—Chattel Mortgage—Rights of Mortgagee.*

Where goods were mortgaged, and after default remained with the mortgagee, who made an assignment in insolvency, and handed them over to his assignee: *Held*, that the mortgagee could not take them out of the assignee's possession, but must enforce his claim under the Insolvent Act, and that he was a trespasser in so taking them.

TRESPASS to, and trover for goods.

Pleas—not guilty, and goods not the goods of the plaintiff.

The cause was tried at the Peterborough fall assizes before Hagarty, C. J., C. P., without a jury.

The facts were, that Brooke was in business, and on the 9th of January, 1869, gave a chattel mortgage to one W. Hall, to secure the sum of \$2,314.60, which was duly renewed. On the 25th of November, 1869, Brooke made a chattel mortgage to the defendant to secure endorsements by the defendant for him, Brooke, and the renewals, to the extent of \$7,600. That mortgage was filed on the day after, and was not refiled.

Brooke, on the 26th of November, 1870, made another chattel mortgage to the defendant to secure endorsements to the amount of \$7,800, and a note held by defendant for \$1,000. It was filed on the 1st December, 1870. By this mortgage Brooke was to hold the property mortgaged until default, and default had happened before Brooke made the voluntary assignment in insolvency next referred to.

Brooke on the 1st of May, 1871, assigned to the plaintiff as official assignee, and he was left in possession for the assignee until the 28th of June after.

On that day the defendant took possession under his mortgage.

Brooke was called as a witness, and said: "Defendant endorsed a renewal of a \$700 note after the second mortgage was given; also renewals of notes for \$2,500 and \$1,000; and he took up a note of \$1,000 mentioned in that mortgage. At that time my liabilities were about \$23,000; assets about \$15,000, less \$1,300 for articles which were not removable under my lease. When I gave the second mortgage I thought I was solvent, I thought I could pull through. The second mortgage was given on the condition that defendant was to continue to endorse for me."

There was other evidence given, but not material.

The defendant's counsel took several objections to the case.

The learned Chief Justice found that Brooke was insolvent when he gave the defendant the second mortgage, but that defendant dealt with him in good faith, believing he was solvent and able to get through; and he endorsed for Brooke on the faith of the security, which he would not have done but for such security.

In the event of the Court holding the defendant liable, he is to return the goods to the assignee; failing which the goods are to be valued, and the defendant will have to pay according to the valuation. A memorandum to that effect was endorsed on the record.

The Court might decide that defendant was a trespasser, although his security remained unimpeached—that is, that he should have pursued his remedy in the Insolvent Court, and should not have taken the goods from the possession of the assignee.

It was then agreed that a verdict should be entered for the defendant, with leave to the plaintiff to move to enter the same for him, if the Court should decide upon the facts and law in his favour, and either award him

substantial damages, to be ascertained as before mentioned, or nominal damages.

In Michaelmas Term last *C. S. Patterson* obtained a rule calling on the defendant to shew cause why the verdict should not be set aside and a verdict entered for the plaintiff, on the leave reserved, and on the grounds:

1. That the mortgage under which the defendant claims is void, because it was taken in contravention or in evasion of sec. 5 of Consol. Stat., U. C., ch. 45.

2. That the mortgage is void, as having been made in contemplation of insolvency, under section 89 of the Insolvent Act of 1869.

3. That the plaintiff as assignee having taken possession of the goods in question, it was not lawful for the defendant to take them out of his possession; but the defendant was confined to his remedy under section 50 of the Insolvent Act of 1869.

During this term *J. K. Kerr* shewed cause. The defendant's second mortgage was not an evasion of the Chattel Mortgage Act: *Turner v. Mills*, 11 C. P. 366; *Fraser v. The Bank of Toronto*, 19 U. C. R. 381. It was said the mortgage was given contrary to the Insolvent Act of 1869. But the Chief Justice found that expressly against the plaintiff. [The authorities and argument on this point are omitted as the Court accepted the finding of the Chief Justice as satisfactory]. The plaintiff also contended that the defendant could not take the goods under his mortgage, although it was neither disputed nor impeached, but that he should have pursued his remedy under the 50th section of the Insolvent Act. If that section can apply to the defendant, it should equally apply against the plaintiff in this suit. By the 10th section a pledgee or other person in possession of goods with a lien thereon, is not to be deprived of possession without payment of his claim, except in the case of his proving his claim against the estate, and



putting a value on his security. And the 60th section shews the assignee has no control over the rights of the mortgagee, unless he rank or claim to rank upon the estate :—*Re Hurst*, 31 U. C. R. 116 ; *Gordon v. Ross*, 11 Grant, 124. The case of *Archibald v. Haldan*, 30 U. C. R. 30, determined that the mortgagee was not obliged to prosecute his claim under the Insolvent Act, but might resort to his common law rights.

*Patterson*, Q. C., supported the rule. The 5th section of the Chattel Mortgage Act limits securities for endorsements to a period, "not extending for a longer period than one year from the date of such mortgage." And if the defendant, after the expiration of that period, renewed or extended it by his second mortgage, then he was evading the Act, or doing something not at all warranted by it: *Ex-parte Cohen*, *Re Sparke*, L. R., 7 Ch. App. 20. The plaintiff, as assignee, was entitled to the possession of the goods as against the defendant : and the defendant's remedy, if he have any, is under the 50th section of the, Insolvent law ; but he had no right to take the law into his own hands and take the goods, and by doing so he became a trespasser.

WILSON, J.—In this case the second mortgage did include a new debt of \$1,000.

It is not necessary to determine whether this mortgage is valid or invalid, for, assuming it to be a valid security as the defendant contends it was and is, he is still not entitled to recover upon or in respect of it in this action.

It appears to me that under the 50th section of the Insolvent Act, and according to *Archibald v. Haldan*, 30 U. C. R. 30, the defendant should not have taken the goods from the possession of the assignee.

In the case last mentioned the action was by the mortgagee against the assignee, for taking the mortgaged goods and selling them before the mortgagee had elected to come in and prove his claim, and before there was any adjudication by the creditors as to what should be done with respect to the mortgage.

In this case, the action is by the assignee in insolvency against the mortgagee. The assignee was rightly placed in possession of the goods by the debtor, who had the actual possession of them. The assignee of course took no other right to them than the debtor had, or than the Statute conferred upon him.

The sale of the goods in *Archibald v. Haldan* was held to have made the assignee a wrongdoer for the conversion. It was also said there that the mortgagee was entitled to have the possession of the goods until his claim was adjudicated upon.

Under the 10th and 60th sections, if the mortgagee be in possession he cannot have the goods taken from him unless on payment of his claim, or on an adjudication of his rights, which, by the 50th section, he is compelled to submit to in insolvency.

On the other hand, if the assignee be put in possession by the debtor, or by the sheriff, I think the mortgagee cannot enforce any claim for a right of property to the goods in the possession of the assignee by suit at law.

The case of *Archibald v. Haldan* should not have been so decided but for the sale or conversion of the goods by the assignee, without any authority whatever.

When the defendant took the goods from the possession of the assignee, he was not justified in doing so. The only remedy of the plaintiff is by action at law to get them back again. This will not prejudice the defendant in getting the full benefit of his mortgage in the Insolvent Court.

The rule will be absolute to enter a verdict for the plaintiff for the full value of the goods, to be ascertained by valuation as aforesaid; or for a nominal sum, if the defendant will within one month restore the goods to the plaintiff.

MORRISON, J., concurred.

*Rule accordingly,*

## ANDREW PERRIN v. WILLIAM PERRIN.

*Arbitration—Award—Separate Finding.*

The plaintiff and defendant agreed to refer all matters touching and concerning all claims and demands whatsoever of the plaintiff against or in respect of the estate of the late T. P. (except as to a specific devise), and all accounts, claims, and demands whatsoever then existing between the plaintiff and defendant as executor of T. P., or otherwise howsoever. The arbitrator awarded that \$4,485 was due from defendant, as executor of T. P. and otherwise, to the plaintiff in respect of the matters referred, which sum he directed to be paid, and that when paid it should be in full satisfaction of all demands by plaintiff against defendant as such executor and otherwise in respect to all the matters referred :

*Held*, no objection to the award, that it did not find separately the amount awarded against defendant as executor and in his own right.

THE declaration set out, that before and at the time of the making of the agreement thereafter mentioned, matters in difference such as thereafter mentioned were depending between the plaintiff and the defendant, and thereupon by an agreement dated, &c., between the plaintiff and defendant, &c., all matters touching and concerning all claims and demands whatsoever of the plaintiff against or in respect of the estate of the late Thomas Perrin (except a specific devise), and all accounts, claims, and demands whatsoever then existing between the said Andrew Perrin and William Perrin as executor of the late Thomas Perrin, or otherwise howsoever, should be referred to the award of Nelson Howell: that Howell took upon himself the said reference, &c., and made and published his award in writing, under his hand and seal, respecting the said matters referred and awarded, that the sum of \$4,485.67, was due and owing from the said William Perrin, as executor of the late Thomas Perrin's will as aforesaid and otherwise, to the said Andrew Perrin in respect of the matters by said submission to him, the said arbitrator, referred; and he further awarded and ordered that the said defendant should pay the said sum, &c., to the plaintiff, and the same when so paid should be in full satisfaction and discharge of all demands and charges by the said plaintiff against the said defendant as executor as aforesaid, and otherwise how-



soever, for and in respect to all the said matters respectively by the said agreement referred to him, the said arbitrator, as aforesaid, and due or owing up to the time of the said parties entering into the said agreement.

To this the defendant demurred, on the following grounds:

1. That the award was uncertain in not stating in what sum the defendant as executor of the late T. Perrin was indebted to the plaintiff, and in what sum on account of other matters, leaving it impossible for the defendant to know what part of the sum awarded should be charged to the estate of the late Thomas Perrin or paid from assets in his hands as executor, and what part should be charged to himself or paid out of his own moneys.

2. In the said count the defendant is declared against and alleged to be indebted for the whole sum awarded in his representative capacity as the executor of, the late Thomas Perrin, while in the writ as recited in the declaration the defendant is sued personally.

3. The said award leaves it uncertain whether or not the matters submitted are finally disposed of from using or adding the words, "and due or owing before or up to the time of entering into the said agreement."

4. The award is in excess of the submission, in awarding that actions shall cease and releases be executed.

During this term *C. S. Patterson*, Q. C., for the demurrer cited *Mulligan v. Wright*, 16 U. C. R. 408.

*Harrison*, Q.C., contra, cited *Barry v. Rush*, 1 T. R. 691, *Robson et al. v. ———*, 2 Rose 50; *Smith v. Muller*, 3 T. R. 624; *In re Wansborough*, *Wansborough v. Dyer*, 2 Chitty 40, note (a); *Riddell v. Sutton*, 5 Bing. 200; 2 Wms. Exrs., 6th ed., 1636, 1637, 1648; *Hemsworth v. Brian*, 2 D. & L. 844; *Taylor v. Shuttleworth*, 6 Bing. N. C. 277; *Bradley et ux v. Phelps*, 6 Ex. 897; *Charles v. Carroll*, 9 U. C. R. 357; *Day v. Bannin*, 3 Bing. N. C. 219; *McGill v. Proudfoot*, 4 U. C. R. 40; *Watson v. City of Toronto Gas Light and Water Co.*, 5 U. C. R. 523; *Crosbie v. Holmes*, 3 D. & L. 566; *Rule et al v. Bride et al.*, 1 Ex. 151; *Russell on Awards*, 4th ed., 283.



MORRISON, J.—This is an action brought to recover the amount of an award, which proceeded upon a submission made between the plaintiff and defendant in their own rights.

On the argument it was contended that the award as set out in the declaration was bad, on the ground that it did not dispose of the matters referred, as the arbitrator omitted to specify in his award what amount he awarded in respect of the plaintiff's dealings with the defendant as executor, and the amount against the defendant in his own right.

I think there is nothing in the objection, and that the plaintiff is entitled to judgment on the demurrer. The matters submitted were all matters touching and concerning claims and demands against or in respect of the estate of the late Thomas Perrin, excepting as mentioned in the declaration, and all accounts, claims, and demands whatsoever then existing between the plaintiff and defendant as executor of the late Thomas Perrin, or otherwise howsoever. The count alleges that the arbitrator made the awards respecting the matters referred, and awarded \$4,485.67, as due and owing from the defendant as executor and otherwise to the plaintiff, in respect of the matters referred to him, and he further awarded and ordered that the defendant should pay the said sum of \$4,485.67 to the plaintiff, and the same when paid should be in full satisfaction and discharge of all demands and charges against the defendant as executor and otherwise howsoever, for and in respect to all the said matters referred to him, and due or owing up to the time of the submission.

It is clear upon authority that a submission of all demands and disputes extends as well to all disputes between the parties in their own right as in *auter droit*, comprehending the liability of the parties as executors, &c. See *Russell* on Arbitration, 3rd ed., 116, and *Watson* on Awards, 2nd ed. 12, and the cases there referred to; and, as said by Gibbs, C. J., in *Bullen v. Townsend*, 7 Taunt. 426 "The reference of all matters in dispute refers all other their civil rights."

Now, in this case, if the claims and demands against the defendant as executor were not specifically referred to in the submission, the general words would have included all such demands. The submission is in effect one of all matters whatever between the plaintiff and defendant. The mere specifying the plaintiff's claims against the defendant as executor is introduced, I take it, *ex abundanti cautela*. I see nothing indicating that the parties intended that the matters referred should be awarded upon separately. The object of the submission was to ascertain the amount due between the parties upon all accounts, claims, and demands whatsoever.

No authority was cited to shew that under such a submission the arbitrator should have distinguished the separate amounts. The case of *Whitworth v. Hulse*, L. R. 1 Ex. 251, is, on the other hand, an authority in favor of the plaintiff. There the objections were similar to those taken here, and Martin, B., in giving judgment said, "If several matters are referred to an arbitrator, he must decide them all; and again, if on the construction of the agreement he is to decide the matters referred separately, he must do so; for if this is the bargain of the parties, it must be observed, otherwise the arbitrator does not follow the authority given to him. The question is, therefore, does the submission contain anything requiring the arbitrator to decide separately the matters referred to him? So far from that being said, the agreement rather says the contrary. The document of the 3rd of January, 1865, is the formal agreement of the parties, and after reciting that Child should determine what sum Whitworth should, *upon the balance of accounts* between them, pay to Hulse for the transfer of the shares, it refers to his arbitration all matters in dispute between them, and the amount to be paid for the shares. This conveys to my mind the idea that Child is authorized to settle all matters in dispute, and what is to be paid on the whole balance by Whitworth to Hulse. This award directs accordingly that Whitworth shall pay to Hulse £22,978, and in this the arbitrator appears to me to have

exactly pursued his authority." Pigott, B., said, "I do not think that the parties intended that the amount to be paid for the shares should be found separately. If this had been their meaning, they would have said so in clear terms, whereas the result they appeared to have required was the balance which on the whole account was to be paid to Hulse."

So, in the case before us, it appears to me that what the parties required was the amount due from the defendant to the plaintiff upon all accounts between them.

The plaintiff is therefore entitled to judgment.

WILSON, J., concurred.

*Judgment for plaintiff.*

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McCULLOCH v. THE GORE DISTRICT MUTUAL FIRE  
INSURANCE COMPANY.

*Fire Insurance—Rejection of evidence—Effect of two-thirds clause in policy.*

In an action on a fire policy, it appeared that among the questions answered by the agent of the Company on effecting the insurance was one, "Had the applicant ever had any property destroyed by fire, and under what circumstances? Was it insured, and in what office?" to which the agent answered that the plaintiff had never before had property destroyed by fire that he had heard of. *Held*, that the plaintiff, as a witness on his own behalf, might be asked on cross-examination as to what passed between him and the agent on this subject, but that the plaintiff's answer would be conclusive.

Where a separate insurance is effected on separate properties the insured can recover two-thirds only of the particular property injured.

ACTION on a fire policy dated 23rd of November, 1869, for \$800, being on furniture and goods described as Surgical Instruments, insured for \$75; Dispensary and Druggist implements. insured for \$75; Medical books insured for \$100; shop furniture and stoves insured for \$50; and the plaintiff's stock of drugs, medicines, chemicals, bottles, pots, and jars, \$500.

Pleas, 1. Denial of policy. 2. That the detailed state-



ment of the plaintiff's loss sworn to by him, and delivered to the defendants as and for the amount of his loss, was false and fraudulent in this, that the value of the plaintiff's goods insured by the defendants and destroyed by fire as alleged, was not \$1,200, as in the detailed statement alleged, but was of much smaller value, as the plaintiff at the time of making the statement well knew.

Issue.

The cause was tried at the last Fall Assizes at Cobourg, before Hagarty, C. J., C. P., when a verdict was rendered for the plaintiff for the full amount of his insurance, \$800, and \$62 for interest.

The whole question at the trial was on the second issue, whether there had been fraud and false swearing by the plaintiff in his statement of loss.

The application for the policy contained a provision in the following words, "The amount of the proposed insurance is estimated by me at not more than two-thirds of the value of the property to be insured, and should I be insured pursuant to this application, I agree that in case of loss by fire the company shall only be obliged to pay as if they had insured two-thirds of the actual cash value of such property, anything contained in this application or the policy of insurance to the contrary notwithstanding."

The first condition endorsed upon the policy provided that "in all cases the insured will be bound by the application."

The agent of the company made an affidavit, in which he stated that the verdict was in excess of the two-thirds value of the goods destroyed in respect of the surgical instruments, dispensary and druggist's implements, shop furniture and stove, and stock of drugs, medicines, chemical bottles and pots; but not in respect of medical works. This excess he fixed in the whole at \$60 83c., and \$4 71c. interest on that excess.

In Michaelmas Term last *Anderson* obtained a rule calling on the plaintiff to shew cause why a new trial should not be had, on the ground that the verdict was contrary to



law and evidence, and the weight of evidence ; and on the ground of the improper rejection of evidence by the learned Chief Justice, in refusing to allow the plaintiff to be asked on cross-examination whether he had ever been burned out before, and how often, and what claims he had made against any insurance companies on such occasions ; and on the grounds of discovery of new evidence ; and on grounds disclosed in affidavits filed.

In this term *Patterson*, Q. C., shewed cause. The plaintiff had not to answer any questions in his application for insurance as to former fires. There is endorsed on the policy a list of questions to be answered by the insurance agent, and that is a question which *he* has to answer. And he did answer it by saying that the plaintiff had never before had property destroyed by fire, that he, the agent, had ever heard of. He may have asked the plaintiff questions at the time of his application, to enable him to give the proper answer to the Company ; but that did not entitle the defendants at the trial to enter into that enquiry. There was no issue to which it was applicable. Beside, the rule does not state the matter correctly. The plaintiff was asked what he told the insurance agent at the time of the application as to former fires.

The affidavits filed have been fully answered.

*Anderson*, Q. C., and *C. A. Durand*, supported the rule. The evidence was very strongly in favour of the defendants. The plaintiff gave no satisfactory account of his property. The evidence rejected was just as it is stated in the rule ; but if it were as the plaintiff says it was, it should have been allowed. It was admissible at all events to test the plaintiff's credibility : *Tennant v. Hamilton*, 7 Cl. & F. 122 ; *The Attorney-General v. Hitchcock*, 1 Ex. 93 ; *Taylor on Evidence*, 6th Ed., sec. 1292 *et seq.*, p. 1243.

WILSON, J.—The Chief Justice has noted “ I refuse to allow questions as to what passed between him, the insured, and the agent, as to whether he had been burned out before, which agent asked.”

It does not appear that the plaintiff declined to answer, but that is of no consequence, if the question could not lawfully be put.

In *Henman v. Lester*, 12 C. B. N. S. 776, the defendant on cross-examination was asked "Whether there had not been proceedings against him in a County Court at the suit of one A. in respect of a similar claim, which he had resisted, and upon which he had given evidence, and the jury notwithstanding found their verdict for the then plaintiff." The Court held the question could be put, although the County Court proceedings were not produced. On the point now material here Willes, J., said: "It was hardly disputed that the enquiry was admissible as going to the credit of the witness."

In *The Attorney-General v. Hitchcock*, 1 Ex. 91, 102, Alderson, B. said: "The witness may also be asked as to his state of equal mind, or impartiality, between the two contending parties, questions which would have a tendency to shew that the whole of his statement is to be taken with a qualification and that such a statement ought really to be laid out of the case, for want of impartiality."

The defendant in an action for an indecent assault, may be examined with respect to alleged improprieties committed by him towards other persons, although these collateral imputations can neither be disproved nor supported by independent evidence: *Tolman et ux v. Johnstone*, 2 F. & F. 66, Per Cockburn, C. J., after consulting the other Judges.

Suppose a witness, not this plaintiff, had been called, and in order to shew he was not impartial he had been asked whether he knew the plaintiff had ever before been burned out, and whether he did not, at the time of the plaintiff's application, tell the insurance agent that the plaintiff had not at any time to his knowledge been burned out. That would shew, if true, the witness was friendly and partial to the plaintiff and hostile to the defendants. It would relate also to the very subject of the suit, although not to any issue in the suit. And it would have a ten-

dency to shew that a witness who had so acted was not a man who could be fully depended on to speak the truth.

In my opinion a witness could be so interrogated. And if he could, the plaintiff himself when he is a witness may be examined in like manner.

The answers of the witness when given would be conclusive.

I am also of opinion when a separate insurance is effected on separate properties, and the two-thirds value applies; that the insured can recover only the two-thirds on the properties injured or destroyed, and not on the two-thirds of the total insurance.

For instance, a house is insured for \$1000 and furniture for \$2000, and the house is sworn to be worth \$3000, and it is totally destroyed by fire, but none of the furniture, which is worth \$3000, is injured. The plaintiff cannot recover the two-thirds of the value of the whole property covered by the policy up to the sum insured; for that would give him the whole \$3000 upon his house, which is its full and not its two-thirds value, and yet there is only an indemnity of \$1000 on it which the Company was to make good in any event.

The two-thirds clause is to make the insured interested in the property to some extent himself, but here the insured would be getting the full value of his house, which alone was destroyed. He should be interested in saving every part of his property when separate risks are taken as separate parts of it. Otherwise frauds might be committed, or negligence encouraged. A person who could get the full value of his house, in such a case, would have no inducement to keep it from fire or to exert himself in saving or protecting it during fire, while he might very conveniently remove the whole of his other property insured.

This matter was not presented to the learned Chief Justice at the trial, but has been stated now for the first time on affidavit. The excess is said to be \$65.54. The verdict in any event would have to be reduced by that amount.

This case has been tried three times. The first two trials



ended without a verdict, by the disagreement of the jury and unquestionably it is not a matter of astonishment they did not agree.

If the application for a new trial had depended on the evidence being sufficient to sustain the verdict, we could not have interfered.

The rule will be absolute for a new trial in consequence of the rejection of evidence, without costs.

MORRISON, J., concurred.

*Rule absolute.*

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### CARTER AND TODD V. BINGHAM.

*Sale of goods—Action for non-delivery—Proof of contract, and of readiness to accept.*

In an action for non-delivery of 15 bales of hops alleged, to have been sold by defendant to plaintiffs, the evidence shewed that, in conversation with one of the plaintiffs about the purchase of hops, defendant said he would sell at 20 cents per pound and would keep the offer open for a few days. Subsequently, on the 17th of August, plaintiffs telegraphed defendant "Will take 15 to 20 bales good new hops at 20 cents cash." On the 21st defendant replied by telegram, "Your offer accepted. Have booked your order for 15 bales new hops for delivery when picked." On the 16th of September defendant telegraphed "Hops picked, ready for delivery. Answer back." On the 21st of September plaintiffs telegraphed "Our man will be there ready to receive hops early next week," and on the 26th of September "Ship the 15 bales hops to us Galt to-day, and draw at three days sight"; And on the 27th "If hops not shipped will send team and money for them to-morrow. Answer quick." On the same day defendant replied "Cannot have hops." A tender of the price was subsequently made and refused.

**Held**, 1. That there was no binding contract at any time between the parties, for the defendant's answer of the 21st of August was not a simple acceptance of the plaintiffs' offer of the 17th, but qualified it both as to quality (by leaving out the word *good*) and as to time of delivery; and assuming defendant's telegram of the 16th September to be a renewal of such acceptance, the plaintiffs' subsequent telegrams did not shew an assent to it.

**Held**, also, that if there had been a previous binding contract the plaintiffs' delay, while the market was rising, in not answering the telegram of the 16th of September until the 21st, justified the jury in finding, as they did, that the plaintiffs were not ready and willing to accept and pay for the hops within a reasonable time.

THE declaration contained one count, for that it was agreed between the plaintiffs and defendant that the defen-



dant should sell &c., and that the plaintiffs should buy from the defendant 15 bales of hops at the price of twenty cents a pound, to be paid for by the plaintiffs on delivery; and all conditions were fulfilled, &c., yet the defendant did not deliver the goods to the plaintiffs, &c.

Pleas, 1. That defendant did not agree as alleged. 2. That the plaintiffs were not ready and willing to accept and pay for the said hops according to the terms of the agreement.

Issue.

The cause was tried at Guelph, before Wilson, J.

It appeared in evidence that some time before the 17th of August last Todd, one of the plaintiffs, had a conversation with defendant about a purchase of hops, and asked him if he would sell them. Defendant said he would sell at twenty cents per pound, and that he would keep the offer open for Todd for a few days. Todd was to telegraph him, and the following telegrams passed between the parties.

August 17, 1871.

Plaintiffs to defendant—Will take 15 to 20 bales good new hops, 20 cents, cash.

21st August, 1871.

Defendant to plaintiffs—Your offer accepted. Have booked your order for 15 bales new hops for delivery when picked.

16th September, 1871.

Defendant to plaintiffs—Hops picked ready for delivery. Answer back.

21st September, 1871.

Plaintiffs to defendant—Our man will be there to receive hops early next week.

26th September, 1871.

Plaintiffs to defendant—Ship the 15 bales hops to us Galt to-day, and draw at three days' sight.

27th September, 1871.

Plaintiffs to defendant—If hops not shipped will send team and money for them to-morrow. Answer quick.

27th September, 1871.

Defendant to plaintiffs—Cannot have hops now.

It also appeared in evidence that the plaintiff did not notice or reply to the defendants' telegram of the 16th September, which he received on the morning of that day, until the 21st, when he sent the telegram of that date; and that although a person with money was sent on the 25th of September, he did not see the defendant, or rather failed to find out where he lived; and it was also proved that the plaintiffs sent another person to the defendant on the 28th of September, who offered him on behalf of the plaintiffs the price of the hops, and stated that he would receive them, but that defendant refused to give him the hops, saying that if the plaintiffs had sent sooner he could have had them.

At the close of the plaintiffs' case a nonsuit was moved, on the ground that the contract was not proved. The learned Judge was of opinion that the plaintiffs failed in making out their case; but thought it better that it should go to the jury, reserving leave to defendant to move. After some evidence on the part of the defence, the case was left to the jury, the learned Judge asking them, assuming that there was a binding contract, to say whether the plaintiffs were ready and willing to pay for the hops in a reasonable time, and if they found they were, to say the amount of damages.

The jury found in favor of the defendant.

During Michaelmas Term *Anderson* obtained a rule *nisi* for a new trial, on the ground that the verdict was against law and evidence.

During this term *M. C. Cameron*, Q. C., shewed cause, citing *McIntosh v. Brill*, 20 C. P. 426.

*Anderson*, Q. C., and *C. A. Durand* supported the rule.

MORRISON, J.—The rule of law I take to be, that an acceptance of a proposition must be a simple and direct affirmative in order to constitute a contract, and if the party to whom the offer or proposition is made accepts it on any condition, or with any change of its terms or provisions, which is not altogether immaterial, it is no contract

until the party making the offer consents to the modifications: that there can be no contract which the law will enforce until the parties to it have agreed upon the same thing in the same sense.

Such is the view of the law taken by the Court of Common Pleas in *McIntosh v. Brill*, 20 C. P. 426, cited on the argument, and the various authorities referred to in the judgment of the learned Chief Justice. I also refer to the cases of *Sievwright v. Archibald*, 17 Q. B. 103; *Gether v. Capper*, 14 Q. B. 39; *Moore v. Campbell*, 10 Ex. 323, and *Hamilton v. Terry*, 11 C. B. 954.

Now was the reply of the defendant of the 21st of August to the plaintiffs' offer of the 17th a simple acceptance of that offer, or an acceptance upon terms differing from the plaintiffs' proposal? If the latter, then there was no contract concluded by that conditional acceptance until the plaintiff assented to and accepted the modifications. I do not think the defendant's reply of the 21st of August amounted to a simple acceptance of the plaintiffs' offer.

The plaintiffs' offer was one which, from the evidence, arose out of a previous conversation between one of the plaintiffs and the defendant about purchasing hops, and after taking time to consider, the plaintiffs telegraph the defendant "Will take 15 to 20 bales good new hops 20 cents cash;" to which defendant replies "your offer accepted; have booked your order for 15 bales new hops for delivery when picked." The plaintiffs make no reply to these terms, but remain silent. It was argued that the plaintiffs by not replying acquiesced in the modification, if any, of their offer. It may be so, but they never intimated any acquiescence to defendant in writing, so as to make it a binding contract on them.

It was also further contended that there was a binding contract between the parties on the 21st of August. In the plaintiffs' offer the hops are designated as "good new hops," and it is silent as to the time of delivery, and may be taken as an offer for hops deliverable at once. The defendant replies to this offer on acceptance saying he has booked



plaintiffs' order for 15 bales new hops, omitting the qualifying word "good," and introducing the further term "for delivery when picked." If the defendant's acceptance had been to the effect, that he accepted his offer simply, there would have been a contract binding on the defendant to provide good new hops in a reasonable time, and on the plaintiffs to receive them paying cash on delivery; but the defendant's acceptance was a conditional one, varying the quality of the hops, and superadding the condition that a specific event should happen before delivery, and intimating that they were hops to be picked, and not then ready for delivery.

In the case of *McIntosh v. Brill*, 20 C. P. 426; the Court held that an offer of one hundred kegs of butter at 20 cents was not accepted by a reply "Will take your butter if good at 20 cents," as it introduced a new term, viz., that it must be good: in other words, qualifying it to be butter that would answer the description of good butter, not any butter. Here the offer is for good new hops, the reply, to furnish new hops, which might be fulfilled by a delivery of any kind of new hops of a marketable quality.

But irrespective of the qualifying the acceptance as to the kind of hops, the introduction of the period of delivery was most important, and it certainly qualified the plaintiffs' offer very materially, changing it from a delivery within a reasonable time to a delivery at a time after the hops stipulated to be furnished by the defendant had been picked; and to this qualified acceptance or proposition of the defendant, the plaintiffs sent no reply.

In *Brill's* case, already cited, the Court said, that as the defendant received no answer for two days to his conditional offer, he might have considered the negotiations at an end. In the present case no reply was sent. And the Court there also said that after M. received B.'s offer to take the butter if good, M. might at once have sold it to any other person, and if B. claimed it he, B., could have been answered conclusively: "As soon as you introduced the words as to its being good I did not agree thereto, or did not choose to



warrant its being so." So here, when the defendant replied I accept your offer for 15 bales new hops for delivery when picked, and the plaintiffs never replying to or acquiescing in that modification of their offer, the defendant might say equally well to the plaintiffs, "There was no contract concluded between us, as you did not accept my terms qualifying your offer."

I am therefore of opinion that there was no binding contract created by the telegram of the 21st of August.

Assuming, however, that the defendant's telegram of the 21st of September was a continuation of his telegram of the 16th and a renewal of his then qualified acceptance of plaintiffs' offer, for up to that date there was no assent to it yet, the plaintiffs did not reply to that telegram until the 21st of September, and even then did not assent to or accept the previous offer of the 21st of August, but rather introduced a new condition in the receiving of the hops early the following week; and their next telegram of the 26th very clearly shews that the plaintiffs had not accepted and were not acting upon the terms of the defendant's proposal; and so in my judgment there was not at any time any binding contract between the parties.

But irrespective of these considerations, and assuming that the defendant's telegram of the 16th September intimating that the hops were ready for delivery, and requiring an answer from the plaintiffs, was sent in pursuance of the alleged binding contract, and the plaintiffs not offering to take the hops and pay the purchase money until the 21st of September, as appeared by the evidence, and the learned Judge having left it as a question to the jury under the issue raised by the second plea, whether under the circumstances they were satisfied that the plaintiffs were ready and willing to accept and pay for the hops in a reasonable time, and the jury having found against the plaintiffs on that issue, I am not prepared to say that the finding and verdict were against evidence.

It appeared from the evidence that the price of hops was rising, and in fact did rise by the 27th of September to more

than double the price to be paid by the plaintiffs, and it was their duty to act promptly, and within a reasonable time after notice that the hops were ready for delivery, to shew their readiness and willingness to fulfil their part of the contract; and whether they did do so, was a question entirely for the jury; and being left to them with an unobjectionable charge, I see no ground for disturbing the verdict.

Upon all these grounds we think the rule for a new trial should be discharged.

WILSON, J., concurred.

*Rule discharged.*

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AUSTIN V. GORDON.

*Insolvent Acts of 1864 and 1869—Effect of discharge under.*

An antecedent debt in respect of which an insolvent has duly received his discharge under the Insolvent Acts of 1864 and 1869, is a continuing debt in conscience, and a sufficient consideration for a new promise to pay it.

DEMURRER.

Declaration on a promissory note made by defendant on the 10th of May, 1867, for \$577.25, payable to the order of the plaintiff, four months after date,

Fourth plea—That after the passing of the Insolvent Act of 1864, the defendant became and was an insolvent within the meaning of the said Act, and thereupon, on the 5th of June, 1865, duly executed a voluntary assignment, in pursuance of the said Act, to John Whyte, of the City of Montreal, an assignee duly named by his creditors at a meeting of such creditors duly called for that purpose under the said Act; and such proceedings were thereupon had; that afterwards, to wit, on the 2nd of October, 1866, the defendant not having obtained from his creditors the execution of a deed of composition and discharge, or a consent to his discharge under the said Insolvent Act, applied

for, and obtained an order of discharge under the said Act, from the Judge of the County Court of the County of Lanark, absolutely freeing and discharging him from, among others, the debt or claim of the plaintiff hereinafter mentioned; and all conditions were performed, and all things happened and were done, and all times elapsed necessary to entitle the defendant to receive and obtain the said order of discharge from the said Judge. And the defendant says that, before and at the time when he so became insolvent as aforesaid, and before and at the time when he executed the said voluntary assignment under the said Act, he was indebted to the plaintiff in a large sum of money, to wit, \$650, for goods sold and delivered by the plaintiff to the defendant, which was a debt, or claim, or demand, capable of being proved by the plaintiff under the said proceedings in insolvency against the estate of the defendant, and which was mentioned and set forth by the defendant in the statement of his affairs annexed to the said assignment, and which said debt was proved by the plaintiff accordingly; and the defendant was by the said order of discharge absolutely freed and discharged from the said debt. And the defendant says that, afterwards, that is to say, on the 10th of May, 1867, the defendant made and executed the promissory note in the declaration mentioned, for securing to the plaintiff payment by the defendant of the said debt of the plaintiff, from which the defendant had been so absolutely freed and discharged as aforesaid, and upon and for no other cause or consideration whatever; and except as aforesaid there never was any value or consideration to the defendant for the making or payment of the said note in the said first count mentioned.

The plaintiff demurred, on the grounds:—1. That a discharge under the Insolvent Act of 1864, in the said plea mentioned, merely takes away the remedy, while the debt still remains, and that such debt is a good consideration for a subsequent promise.

2. That a promise in writing made by an insolvent after



his discharge under the said Insolvent Act, to pay a debt contracted prior to his insolvency, is not void under the provisions of the said act, and that therefore the said note is valid and founded upon a good consideration.

In this Term the case was argued.

*S. Richards*, Q. C., for the demurrer. The following authorities shew that after proceedings in bankruptcy, a note given for an antecedent debt was a valid note:—*Trueman v. Fenton*, Cowp. 544; *Roberts v. Morgan*, 2 Esp. 736; *Birch v. Sharland*, 1 T. R. 715; *Brix v. Braham*, 1 Bing. 281; *Besford v. Saunders*, 2 H. Bl. 116; *Bailey v. Dillon*. 2 Burr. 736.

The 6 Geo IV, ch. 16, sec. 131, and the 5 & 6 Vic., ch. 122, sec. 43, provide that such subsequent promise must be made in writing. The later Acts 12 & 13 Vic., ch. 106, sec. 204, and 24 & 25 Vic, ch. 134, sec. 164, prohibit the right to maintain an action on any subsequent promise for a debt existing prior to the bankruptcy.

The following cases shew that the present note was given for a good consideration:—*Kirkpatrick v. Tattersall*, 13 M. & W. 766; *Lobb et al. v. Stanley*, 5 Q. B. 574; *Kidson v. Turner*, 3 H. & N. 581; *Ex parte Edwards*, 11 Jur. N. S. 896; *Deacon's Bankruptcy Law*, 3rd Ed., 805.

No one appeared for the defendant.

WILSON, J.—In the cases first cited, ending with *Brix v. Braham*, 1 Bing. 281, the legal determination was, as is stated in that case, “That the debt due before the bankruptcy was a good consideration for the bankrupt’s promise; that it was not barred by the certificate; and that it would have been available even if made after the certificate had been obtained.”

The ground seems to have been that “all the debts of a bankrupt are due *in conscience*, notwithstanding he has obtained his certificate”: per Lord Mansfield, C. J., in *Trueman v. Fenton*, Cowp. 548; and because the Bankrupt Act of that period made void every security given to the



creditor as a consideration for his signing the certificate, which was strong evidence that the Legislature did not mean to avoid a security given on any other consideration, in respect of a bankruptcy claim, than for signing the certificate. The Legislature then avoided all verbal promises made after the issuing of the commission; and latterly, it avoided all promises to pay debts from which the bankrupt was discharged by the commission.

The effect of a certificate, by the 6 Geo. IV., ch. 16, was to discharge the bankrupt from all debts due by him when he became bankrupt, and from all claims and demands provable under the commission.

The effect was the same under the 5 & 6 Vic., the 12 & 13 Vic., and the 24 & 25 Vic.

The effect of a discharge when granted by the Judge, under sec. 9 of the Act of 1864, sub-sec. 10, is not declared, but it may be ascertained by a reference to sec. 9, sub-sec. 3, which specifies what the effect of a consent of the creditors to the discharge of the insolvent shall be; which is, that it "absolutely frees and discharges him from all liabilities whatsoever (except such as are herein specially excepted) existing against him and provable against his estate, which are mentioned and set forth in the statement of his affairs annexed to the deed of assignment, or which are shewn by any supplementary list of creditors furnished by the insolvent previous to such discharge."

The thirteenth sub-section avoids every discharge or composition, or confirmation of any discharge or composition, which has been obtained "by fraud or fraudulent preference, or by means of the consent of any creditor procured by the payment of such creditor of any valuable consideration for such consent." The Act of 1869 is to the same effect.

We do not see such a difference in the wording of our Act from the English Acts, as to require any other interpretation to be placed upon a discharge granted under our Act than has been placed upon the discharge which has been granted under the English Acts.

And notwithstanding the bankrupt has been and is discharged by operation of the statute, and the certificate or order granted under it, it is still a continuing debt in conscience, and the consideration for a new promise to pay it, or for the giving of a new security in respect of it.

By the later English Acts no new promise or security given for the antecedent debt, whether such new promise or security is in writing or not, can be enforced.

That was no doubt the true intent of the law from the first, but it required legislation to correct the judicial departure from it, and we have not adopted that legislation yet. — According to the English authorities, then, the old debt may be the basis of a new liability, under such provisions as are contained in our statute, although I think it is strange, considering the policy of the Bankrupt Law, that such a conclusion was ever come to.

There must, therefore, be judgment on demurrer for the plaintiff.

MORRISON, J., concurred.

*Judgment for the plaintiff.*

# CORNOCK V. DODDS.

*Ejectment—Lease—Construction of—Deduction of rent.*

Plaintiff on the 30th December, 1867, leased two mills to one T., called the Oatmeal Mill and the Erin New Mill, for ten years, at \$1,000 per annum, payable half-yearly in advance, on the 15th of June and December, with a covenant for re-entry on non-payment, and a proviso that if the Oatmeal mill was burned there should be a reduction of \$400 per annum in the rent, and if the New mill was burned a reduction of \$600 per annum, and if both were destroyed the term should cease, and only the proportion of rent due at the time of destruction be paid. The New mill was burned on the 30th of October; the rent up the 15th of December of that year having been paid in advance.

*Held*, that the lessee was not entitled to the reduction of \$600 a year for the period from the 30th of October to the 15th of December, for which he had already paid; and that having insisted upon retaining for such reduction out of the rent falling due on the 15th December, he had incurred a forfeiture by non-payment of his rent.

EJECTMENT for certain premises in the village of Erin.

The plaintiff claimed title by a covenant contained in a lease dated the 3rd of December, 1867, from the plaintiff to one Taylor, by which the plaintiff might recover the premises on nonpayment of the rent, and averment of default in payment of the rent. The defendant denied the plaintiff's title, and that any default had been made in payment of the rent, and claimed title under a lease from the plaintiff to Taylor, and a lease thereof from Taylor to the defendant.

The case was tried at the last Guelph Assizes, before Wilson, J., without a jury.

At the trial the plaintiff put in a lease from the plaintiff to Taylor, dated the 3rd of December, 1867, made in pursuance of the Act respecting short forms of leases, for ten years. The rent reserved was \$1,000 a year, payable on the 15th December and the 15th of June of each year, in advance.

The premises in question, upon which two mills were erected, were known as the "Oatmeal Mill" and the "Erin New Mill."

The lease contained the following covenant, "That in case the said Oatmeal mill became untenable through accidental fire or other fire, the act of any person, other than the culpable act or neglect of the lessee personally, or through tempest or lightning, there shall be a reduction of \$400 per annum in the rent; and in a like case, and under like circumstances, and through like causes, there shall as to the said Erin New Mill be a reduction of \$600 per annum in the rent, and in case of the total destruction, or so as the same are rendered untenable by accidental fire or other fire, the act of any other person than the culpable act or neglect of the lessee personally, or through lightning or tempest, of both of said mills, the term hereby granted shall at once cease and be at an end, and the proportion of rent only up to that time shall be payable." Proviso, for the re-entry by the lessor on nonpayment of rent or non-performance of covenants, or any of them.

The lease also contained a provision that all disputes

arising under the lease should be left to arbitration as therein provided for; also a clause that the expense of renewing any part of the machinery which was worn out through ordinary use and service and renewed by the lessee, should be deducted from and out of the current or accruing or accrued half year's rent; but this should not extend to the removal of the bull-wheel.

The New mill was burned from causes entitling the lessee to a reduction of \$600 per annum on the 30th October, 1869. The whole rent of the premises for the period from the 15th of June, 1869 to the 15th of December, 1869 had been paid by Taylor to the plaintiff in advance before the fire; and the question at the trial was, whether Taylor became entitled, on the destruction of this mill on the 30th of October, 1869, to have a reduction, or deduction of the proportion of rent (\$76.64), from that date to the 15th of December, 1869, made out of the rent which on or after the 15th of December, 1869, become due to the plaintiff on or out of the old mill. And it was contended by the plaintiff that if Taylor was not so entitled there had been a forfeiture of the lease.

It appeared there had been arbitrations arising out of differences under the lease and repairs made, the respective amounts of which were admitted. The figures were not disputed. On the 15th of June, 1871, the plaintiff claimed as their due for rent \$186.80. Within the fifteen days allowed by the statute, the defendant tendered in full of all rent then due \$111.83, which the plaintiff refused, claiming \$186.80; the tender being \$75 less, which \$75 defendant claimed to deduct for the time between the destruction of the New mill and the 15th December, 1869.

The learned Judge found for the plaintiff, reserving leave to the defendant to move.

. During this term *Patterson*, Q. C., obtained a rule to enter a verdict for defendant on the leave reserved, on the ground that the amount tendered by the defendant was sufficient.



*Anderson, Q. C.*, shewed cause.

*Patterson, Q. C.*, supported the rule, citing *Hortop v. Taylor*, 21 C. P. 56; *Andrew v. Hancock*, 1 B. & B. 37; *Spragg v. Hammond*, 2 B. & B. 59; *Stubbs v. Parsons*, 3 B. & Al. 516; *Cumming v. Bedborough*, 15 M. & W. 438; *Sapsford v. Fletcher*, 4 T. R. 511; *Franklin v. Carter*, 1 C. B. 750.

MORRISON, J.—The contention on the part of the defendant is, that he is entitled under his lease to retain or deduct from after accruing rent going to the plaintiff \$76, being the proportionate amount of rent for the time between the 30th of October, the day of the burning of the New mill, and the 15th of December, which money he had paid to the plaintiff on the 15th of June, 1869, as the half year's rent then due for the then coming half year; and that having tendered to the plaintiff his rent due, less that sum, in June, 1871, no forfeiture of his lease has taken place.

It may have been the intention of the parties, when they were arranging the conditions to be inserted in this lease, that what the defendant now contends for should be one of the terms, and probably (looking at the general features of the lease), if it had been suggested to make that condition quite clear, apt words would have been inserted. Be that as it may, it has not been done. The proceeding taken by this plaintiff on account of the non-payment of this \$76, if it is the only cause for this litigation, seems a very harsh one, and one would not be willing to aid in enforcing this forfeiture under the circumstances. But it is with the legal rights of these parties we have to deal, irrespective of other considerations.

The lease, without reference to the contingencies mentioned in it, is one for ten years from the 15th of December, 1867, at a rental of \$1,000 a year, payable in equal payments of \$500 each, half yearly in advance, on the 15th of December and 15th of June in each year, the first payment falling due and payable on the 15th of December, 1867. There can be no doubt so far as to the

intention of the parties. Then comes the proviso in question, which provides that in case the New mill be burnt, there shall be a deduction of \$600 per annum in the rent, and further, that should both mills be burnt the term should at once cease and be at an end, and the proportion of rent only up to that time, *i. e.*, the destruction of the two mills, should be payable. The New mill was destroyed by fire on the 30th of October, 1869, the rent for that current year, ending on the 15th December, 1869, having been paid according to the stipulation in the lease.

Now it seems to me, that the construction to be put on this proviso is, that the annual rent, after the termination of that year, 1869, should be \$400 a year. The rent of the year 1869 had already been paid, and there is no condition or provision that in any contingency any portion should be repaid. We must assume and take it the parties knew, at the time of the execution of the lease, that the rent was payable in advance; that that was the agreement; that it was to be as if really earned in advance. There may have been a good consideration for it independent of security to the lessor, and if it was intended that in the event of the destruction of one mill, a ratable proportion of the rent of that year should be repaid by the lessor on account of the destruction of the mill during that year, or that such amount should be allowed in part payment of the following year's rent of \$400, or that that year's rent should be reduced by such amount, it is only reasonable to assume that the parties would have so stipulated. They have not done so. The lease fixes the rental for the premises at \$1,000 a year, payable in advance, and in the event of a certain contingency happening, which did happen, at \$400 per annum. It does not say that there shall be paid a less sum than \$1,000 or \$400 in any one year, under any circumstances.

Assume that both mills remained intact until the last half year of the ten years, and the New mill was then burnt, the rent being paid in advance as usual, can we say there is anything in the lease to entitle the defendant to

say to the plaintiff "My rent is now at \$400 per annum; you must repay me what I have paid you as rent for so much of the time at \$1,000," or as the case might be. The plaintiff could say, and I think very reasonably, "I was entitled to the \$1000 a year by my lease; you paid it; you have not yet held the premises at a rental of \$400."

The condition for terminating the lease in the event of both mills being destroyed, shews that the parties were fully alive to the necessity of a provision for the ceasing of the rent before the end of the year, and they stipulate that the proportion of rent only due up to that time (the destruction of the two mills), shall be payable.

On the whole, I am of opinion that the learned Judge properly entered a verdict for the plaintiff, and that the rule should be discharged,

WILSON, J., concurred.

*Rule discharged.*

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### STULTZMAN V. YEAGLEY.

*Promissory Notes—Partnership transactions—Consideration—Pleading.*

To an action upon two promissory notes against the maker by the endorsee of the payee, K., the defendant pleaded that the notes were given when he and the plaintiff and K. were in partnership, and in respect of transactions between defendant and K. as partners and of matters involved in the said partnership, and with the understanding and agreement between defendant and K. and the plaintiff, that the notes were to be held by K. and the plaintiff merely as evidence of such transactions, &c., and as security for any sums which might be found due to K. or the plaintiff, on account being taken and settlement made between them and defendant as partners, and upon the terms and condition of such an account being taken at or after the dissolution of the partnership; but that the partnership had since been dissolved and no such account taken or settlement made.

*Held* on demurrer, plea bad, for it admitted a good consideration for the notes, and did not allege expressly that they were not to be sued upon. *Semble*, that it was also defective in not negating any other consideration than that appearing on its face.

DEMURRER—Declaration—First count, on a promissory note made by defendant on the 24th of April, 1871, pay-

able to M. W. Keim or order, for \$2,346 47c., one day after date, and endorsed by Keim to the plaintiff. Second count, on a note dated 17th May, 1871, at six months, for \$136 33c. with interest at six per cent., made by and between the same parties as in the first count.

Second plea—That at the time when the said promissory notes were given to the said Keim, he, the said M. W. Keim, the plaintiff, and the defendant were in partnership, and the said notes were so given in respect of transactions between the said Keim and the defendant as partners, and in respect of matters and dealings involved in the said partnership, and with the understanding and agreement between the defendant and the said Keim, as well as between the defendant and the plaintiff, both before and after the said notes, were so given to the said Keim, and before and after the said plaintiff became the endorsee of the said notes that the said notes were to be held both by the said Keim and the plaintiff merely as evidence of such transactions, matters and dealings, and as security or partial or extra security for any sum or sums which subsequently might be found due to Keim or the plaintiff, upon an account being taken and general settlement made between them and the defendant as partners, and subject to and upon the terms and condition of such an account being taken and settlement made between the said partners at the time of or subsequent to a dissolution of the said partnership, but that after the said notes were so given with the said understanding and agreement, and subject to the said terms and conditions, and before this action was brought, the said partnership was dissolved, without any such account being taken or general settlement made, either at the time of or since the said dissolution between them, the said partners.

Demurrer, on the grounds 1. That the plea does not shew that there was not a valid consideration for the notes sued on, or that the consideration for said notes or either of them has failed, or that there was no other consideration than is mentioned in the plea.



2—That the said plea states that the notes were given as security for any sum that might be found due to the said Keim or the plaintiff, but does not shew that no sum has been found due, or that a sum may not hereafter be found due.

3—That the plea does not shew that the failure to take an account was owing to any act or default of the said Keim or the plaintiff.

4—That the plea does not shew that the agreement therein alleged existed at the time of the making of said notes, or at the time the plaintiff became the holder of such notes, or that the plaintiff had knowledge of the notes being given on any such agreement.

5—That the plea does not shew that the alleged agreement was in writing

During this term the case was argued.

*S. Richards*, Q. C., for the demurrer, cited *Boden v. Wright*, 12 C. B. 445; *Vidal v. Ford*, 19 U. C. R. 88; *Street et al. v. Beckwith*, 20 U. C. R. 9; *Royal Canadian Bank v. Minaker*, 19 C. P. 219; *Kearns v. Durell*, 6 C. B. 596; *Forman v. Wright*, 11 C. B. 481; *Harper et al. v. Pater-son et al.*, 14 C. P. 538.

*Harrison*, Q. C., contra. The Court will intend a writing to have existed, if one be required to sustain the pleading, although a writing is not expressly averred; *Young v. Austen*, L. R. 4 C. P. 553; *Ede v. Scott*, 7 Ir. C. L. R. 607.

Notes given by a member of a partnership to the partnership, or which are assets of the partnership, or which were to be paid out of the partnership funds cannot be recovered on by the partnership or by any member of it from any of the partners: *Neale v. Turton et al.*, 4 Bing. 149; *Burgen v. Fanning*, 4 O. S. 188; *Weston v. Abrahams*, 20 L. T. N. S. 586; See also *Preston v. Strutton et al.*, 1 Anstr. 50; *Heywood et al. v. Watson*, 4 Bing. 496; *McNicol v. McEwen*, 3 O. S. 485; *Allan v. Garven*, 4 U. C. R. 242.

The following cases were cited as to the effect of an oral agreement contemporaneous with the giving of a note; *Davis v. Jones et al.*, 17 C. B. 625; *Pym v. Campbell et al.*, 6 E. & B. 370; *Wallis v. Littell*, 11 C. B. N. S. 369.

The following cases were also referred to: *Strong v. Foster*, 17 C. B. 201; *Taylor v. Burgess*, 5 H. & N. 1; *Re Boys*, L. R. 10 Eq. 467; *Brooke v. Arnold*, Tay. Rep. 25 *Smith v. Judson*, 4 O. S. 134.

WILSON, J.—There have been many authorities cited, some which have an application to this case. Before we can make use of them, however, we must try first to understand the meaning of the plea.

The action is on two promissory notes by the endorsee against the maker.

The plea states, in effect, according to my construction of it, that the notes were given in respect of matters between the *defendant and Keim* as partners, and upon the agreement that the notes should be held by Keim and the plaintiff as evidence merely of the last mentioned matters and as security for any sum which might be found to be due to Keim *or to the plaintiff* upon an account and settlement being made between *the plaintiff, the defendant, and Keim*, as partners, and upon the condition of such account and settlement being made between the three last named parties at the time of, or subsequent to their partnership dissolution.

The *consideration* for the making of the notes was, the partnership matters between the defendant and Keim, But the plea says the notes were also given upon the understanding that they should *be held* by Keim and the plaintiff: 1. Merely as evidence of the partnership transactions between the defendant and Keim; 2. As security for any sum which might be found to be due to Keim or the plaintiff, in the partnership between the plaintiff, Keim, and the defendant; 3. And upon the condition of such last mentioned account being taken at or after the dissolution of that partnership.

If it is to be assumed this agreement was in writing, and was made contemporaneously, which is not the fact, or was made *before* the giving of the notes, and was in existence at the time of the giving of the notes, and that the

notes were given under and by virtue of it, so that it was in effect a contemporary agreement, then I presume the two instruments will have to be read together and expounded as one instrument, and effect given to the whole according to their tenor and the fair interpretation to be put on them.

These notes, then, although given on a good consideration between Keim and the defendant as partners, were to be held by Keim and the plaintiff merely as evidence of the transactions between Keim and the defendant. How they were to be evidence of partnership transactions between them it is impossible to say, for they shew nothing of a partnership transaction on their face, but the contrary. And if they were to be held merely *as evidence*, it may be then said, they were not to be sued upon. But an instrument founded on a good consideration is not to be avoided and the party deprived of his ordinary right of action by so loose and inefficacious an expression.

The notes will be evidence against the defendant of the partnership transactions between him and Keim when they are produced on the trial against him, if he is in a position by any proper plea to call in question the consideration of the notes.

The rest of the plea may be discarded, for it relates to a different partnership and to different transactions altogether, and there remains no defence against the good consideration which the plea admits there was for the making of the notes.

The plea is certainly very confused and perplexing. It seems to be defective also, in not negating any other consideration than that which appears.

There will therefore be judgment on demurrer for the plaintiff.

MORRISON, J., concurred.

*Judgment for plaintiff.*

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## ECCLES V. LOWRY, ADMINISTRATOR OF HAMILTON LOWRY.

*Deed and Mortgage back for purchase money—Covenant for possession until default—Action on—Avoidance of deed for insanity—Effect of—Pleading—Estoppel.*

The plaintiff, on the 4th of April, 1864, mortgaged land to L., who covenanted thereby for quiet enjoyment by the plaintiff until default. To an action against L.'s administrator on this covenant, alleging an eviction by persons claiming under L., defendant pleaded that L. conveyed the land to the plaintiff on the 31st of March, 1864, which was the plaintiff's only title to the land; that the mortgage sued on was to secure the purchase money, and was executed immediately after the deed, and as a part of the same transaction: that the plaintiff by the mortgage covenanted that he was seised in fee and had good right to convey; and that the eviction complained of was an action of ejectment brought by the heirs of L., on the ground that L. was of unsound mind when he executed the deed on the 31st of March, 1864, which was proved at the trial, and the jury thereupon found for the heirs.

*Held*, that the plea was bad; for the avoidance of the deed for insanity did not necessarily involve the avoidance of the mortgage; nor did the estoppel applicable to the deed extend to the mortgage; that defendant should have pleaded L.'s insanity directly to the mortgage if he wished to test its validity; and moreover the parties here were not the same as in the ejectment suit, nor was it certain from the record in ejectment that the recovery therein was on the ground alleged.

## DEMURRER.

Declaration—First count. That Hamilton Lowry, now deceased, by indenture of 31st of March, 1864, conveyed part of lot 1 in the 17th concession of the township of Fitzroy to the plaintiff, and covenanted for quiet enjoyment; that the plaintiff entered into possession, and all things happened, &c., to entitle him to sue for the breach hereinafter mentioned, yet the heirs of Hamilton Lowry, deceased, evicted the plaintiff, &c.

Second count. That by a certain other indenture bearing date the 4th of April, 1864, and made by the plaintiff of the first part, his wife of the second part, and Hamilton Lowry, the intestate, of the third part, the plaintiff did convey by way of mortgage the said lands in the first count mentioned unto Hamilton Lowry; and it was provided by the indenture that it should be void on payment by the plaintiff to Hamilton Lowry, of £850; that is to say, £150 on the 1st of April, 1865, and the further sum of £150 in each consecutive year, until the sum of £850 should be



fully paid. And the said Hamilton Lowry did by the indenture, covenant for himself, his heirs, executors, and administrators, with the plaintiff, that until default should be made in the payment of the money, or some part thereof, at the times and in the manner aforesaid, it should be lawful for the plaintiff, his heirs and assigns, to hold and enjoy and to receive and take the rents, issues, and profits of the land, without any let, suit, eviction, ejectment, interruption, demand, or disturbance of or by him, the said Hamilton Lowry, or his heirs, executors, administrators, or assigns. Yet, before the plaintiff had made default, Jane Lowry, and others (naming them) claiming rightfully by, through, and under the said Hamilton Lowry, did let, interrupt, and disturb the plaintiff in the holding and enjoying of the land, and did bring suit against the plaintiff in the holding and enjoyment of the land, and did evict and eject the plaintiff from the same, and did prevent the plaintiff from receiving and taking the rents and issues of the land, whereby the plaintiff lost his improvements upon the land and was put to great trouble and expense in defending his possession to the same, and otherwise incurred great expense and trouble.

The ninth plea to the second count was as follows: That Hamilton Lowry had made the deed in the first count mentioned to the plaintiff; and the plaintiff had not any title to the land except by the said deed; and the plaintiff made the mortgage in the second count mentioned to secure to Hamilton Lowry the purchase money which the plaintiff on the making of the deed in the first count mentioned had agreed to pay for the land; and the mortgage was executed immediately after the deed in the first count mentioned, and as a part of the same transaction; and the plaintiff by the indenture of mortgage covenanted with Hamilton Lowry that he, the plaintiff, was, at the time of the making of the mortgage, possessed of a good, sure, perfect, and indefeasible estate of inheritance in fee simple of, in, and to the land, and had in himself good right and full power to convey the same to Hamilton Lowry; that the heirs of Hamilton Lowry brought the action in the first

count mentioned, which was an action of ejectment, and in the said action claimed the land, and claimed it only by descent from Hamilton Lowry, and as such heirs, against the plaintiff, (who claimed the land under the deed in the first count mentioned), upon the ground that Hamilton Lowry, at the time of the making of the deed in the first count mentioned, was of unsound mind, and that the said deed was therefore void; and the issue in the said suit was duly tried by a jury; and at the said trial it was proved that at the time of the making of the said deed Hamilton Lowry was of unsound mind, and the jury thereupon rendered their verdict for the said heirs; and the said heirs, by the judgment of the said Court given upon the said verdict, recovered against the plaintiff the possession of the land, and evicted the plaintiff therefrom; and the said eviction is the same eviction and disturbance in the second count complained of and not any other, &c., and the heirs in the said suit claimed and recovered as heirs of Hamilton Lowry in respect of the estate and title which Hamilton Lowry had before the making of the deed in the first count mentioned, and not in respect of any title, interest, or estate granted or conveyed by the plaintiff to Hamilton Lowry by the indenture of mortgage.

Demurrer to the plea, on the following grounds: 1. That the plea, even if true, does not shew any answer or defence, because the recovery by the heirs of Hamilton Lowry does not in any way prevent the plaintiff from maintaining his suit for the causes of action in the second count set forth. 2. That the fact of the existence of the covenant by the plaintiff to Hamilton Lowry, that he, the plaintiff, was possessed of a good, sure, perfect, and indefeasible estate of inheritance in fee simple of and in the land, and the further fact of the recovery by the heirs of Hamilton Lowry, as in the plea alleged, do not in law constitute an answer or defence to the second count. 3. That even if the plaintiff's covenant for title in the second ground of demurrer mentioned were untrue, it would not constitute in law any reason why Hamilton Lowry and the defendant should not be bound

by the covenant of Hamilton Lowry in the second count mentioned, and for breach whereof the plaintiff now brings his action.

Joinder.

During this term the case was argued.

*Ferguson* for the demurrer. The plea is bad because, though in substance apparently intended as a plea of estoppel, it could not operate as such, because not between the same parties. The plea does not say the covenant declared on in the second count was not broken, and the fact that the prior deed and covenant contained in it had been avoided does not shew conclusively that this covenant must be invalid too. If unsoundness of mind were relied on to defeat the former deed, it should have been relied on to defeat this covenant also by a plea pleaded directly to the covenant itself.

*C. S. Patterson, Q.C., contra.* The covenant of Hamilton Lowry in the mortgage must be read along with the deed and the covenant contained in it in the first count mentioned, and as co-operating with it and dependent upon it.

The plea shews that the deed has been avoided altogether, that in fact it never had been inceptive or operative; and if so, the covenant declared upon in the mortgage has been determined or has failed to operate also.

At most, the covenant in the mortgage means, that for such estate as the plaintiff had in the land when he gave the mortgage, he, the mortgagee, would not disturb him in; and neither he nor the defendants have done so, for that estate has failed if it ever had effect, and the plaintiff had not, at the alleged eviction, any such estate as he had represented in the mortgage he was seised or possessed of: *James v. M'Gibney*, 24 U. C. R. 155.

*Ferguson* in reply cited *Rawle on Cov.*, 3rd ed., 167; *Curtis v. Deering*, 12 Maine R. 499.

There was a demurrer also to the fifth replication to the eighth plea, but Mr. *Ferguson* abandoned the 5th replication as untenable.

WILSON, J.—The plea sets up the defence, that as the mortgage was dependent on the deed, and as the deed has been avoided by the finding of a jury, the mortgage has failed also.

And it sets up that by reason of the failure of the deed, the plaintiff had no estate in the land to mortgage, and so the mortgagee's assent that the plaintiff should occupy until default—that is, occupy the the land conveyed or professed to be conveyed—could not operate because it had nothing to operate upon.

The intestate could have taken a mortgage on land from the plaintiff although the plaintiff had nothing in the land he granted. The plaintiff would have been bound by the estoppel, and if the land had in fact been the land of the intestate, the latter would have been bound so long as the mortgage lasted.

There is no reason why in such a case the intestate should not agree with the plaintiff to permit him to occupy without disturbance, so long as there was no default in the payment of the money instalments.

A person who takes a lease of his own land from another, and covenants to pay rent, is bound to pay the rent because he is bound by the estoppel, although in truth the lessor had no such estate in the land he professed to demise.

I do not know whether the heirs of the intestate mean to avoid the mortgage, although it has been given on their land. They may believe the plaintiff will be able to pay the money without recourse being had to the land, and they may be quite willing he should pay it, although he has not got the land.

I do not see why the mortgage made on the 4th of April, should necessarily be avoided on the ground of insanity, because the intestate was insane on the 31st of March, when he made the deed.

The mortgage of later date, containing the re-demise, might in that action have been relied on by the present plaintiff as evidence of a confirmation or re-delivery of the earlier deed. That it was not, is not a sufficient reason for



holding it to have been avoided by the finding against the deed.

I do not think the plea can be used as shewing an estoppel against the mortgage, because, if the supposed estoppel or finding there is against the deed, the defendants should plead directly to the mortgage the insanity of the intestate, if they wish to test the validity of the mortgage.

It is not sufficient to say the deed was proved to be void, and as the mortgage was and is a part of the same transaction it is void too.

It has not been established in any case yet, that a recovery in ejectment is an estoppel except in the subsequent action for mesne profits based upon and ancillary to the ejectment: *Thompson v. Hall*, 31 U. C. R. 367; *Campbell v. Loader*, 3 H. & C. 520, per *Martin*, B.

Here, too, the parties are not the same as those who were parties to the ejectment. They represent the same person, but they represent him in different capacities.

Again, the record in ejectment does not directly and precisely allege the matter relied upon, and which ought to be certain to every intent. The recovery may have been on the ground alleged, but it may have been because the defendant was not able to prove the execution of the deed to him.

This mortgage is collateral to the deed, and an estoppel applicable to the deed does not extend to the mortgage: *Carpenter v. Buller*, 8 M. & W. 209; *Carter v. James*, 13 M. & W. 137; *Hutt v. Morrell*, 3 Ex. 240.

The following cases refer to the defence of insanity: *Elliott v. Ince*, 7 DeG. M. & G. 475, 3 Jur. N. S. 597; *Molton et al. v. Camroux*, 2 Ex. 487; 4 Ex. 17; *Campbell v. Hooper*, 3 Sm. & G. 153, 1 Jur. N. S. 470; *Baker v. Cartwright*, 7 Jur. N. S. 1247; *Beavan v. McDonell*, 10 Ex. 184.

The result seems to be, that dealings of sale and purchase by a person apparently sane, though subsequently found to have been insane at the time of such dealings, will not be set aside against those who dealt with him upon the faith of his being a person of competent understanding.

And it appears also to be settled, that money paid to an insane person will be deemed to be a charge upon the land he has mortgaged.

In this case, if the plaintiff has paid money, his deed may probably be held to be a security or lien until he has been repaid.

I am of opinion the plea is bad in law.

There will be judgment for the plaintiff on the demurrer to the ninth plea to the second count, and for the defendant on the demurrer to the fifth replication to the eighth plea.

MORRISON, J., concurred.

*Judgment accordingly.*

## MEMORANDA.

During this term the following gentlemen were called to the Bar:

THOMAS MATHIE BROOKE, FRANCIS HENRY CHRYSLER, THOMAS JAFFRAY ROBERTSON, HENRY SANDFIELD MACDONALD, ANDREW GREENLEES, JAMES ALBERT PROCTOR, JOHN MARTIN, JAMES ALEXANDER MCDOWALL, ANDREW LEES, ROBERT A. NELLES, FREDERICK WILLIAM JOHNSTON, ALFRED PASSMORE POUSSETTE, ROGER H. C. GREENE, G. W. HERBERT BALL, FRANCIS C. CLEMOW, JOHN S. WILSON, LINDSAY HALL.

CHRISTOPHER ROBINSON, Q. C., was appointed Editor-in-Chief of Law Reports, and H. C. W. WETHEY, Reporter to the Court.

# A DIGEST

OF

## ALL THE REPORTED CASES

DECIDED IN

## THE COURT OF QUEEN'S BENCH.

FROM MICHAELMAS TERM, 35 VICTORIA, TO MICHAELMAS TERM, 36 VICTORIA.

### ACCORD & SATISFACTION.

See PLEADING, 1.

### ACTION.

*When maintainable without actual damage.]—See RIGHT OF WAY.*

### AGENT.

See NUISANCE.  
*Of Corporation.]—See LIBEL.*

### AGREEMENT.

See CONTRACT, 3.

### ALIENAGE.

*Ejectment.]—In 1821 J. S., with his son Samuel, and his daughter H., (who afterwards married M., a British subject) came from the United States, and settled in Canada, all being aliens. On the 20th March. 1821, the Crown granted the land in question to J. S. Neither J. S. nor his children ever took the oath of allegiance. J. S. died on the 17th of May, 1828, and Samuel about the 6th November, 1842 :*

*Held, that under the Alien Act of 1828, assented to on the 10th of*

*May, 1828, J. S. was a British subject, for it might be presumed that he took the oath when he got the patent ; and if not, having died before 1st January, 1850, the period limited by the Act for taking such oath, he was by sec. 13 empowered to take and hold real estate.*

*Held, as to Samuel, that not having taken the oath under the Acts of 1828 or 1841, he was an alien.*

*Held, also, as to Hannah, that having been a resident of the Province on the 1st March, 1828, for seven years, she became a British subject under sec. 2 of the Act of 1828, and also, by intermarriage with a British subject, under 12 Vic., ch. 197, sec. 10 ; and as coming within 4 & 5 Vic., ch. 7.*

*Semble, per Wilson, J., that Samuel, if an alien, would have had the same power to devise as he had to convey by deed.*

*Semble, also, per Wilson, J., that the alienage of J. S. could not have been objected to in his lifetime, except by the Crown, so as to affect his title, and not by the Crown unless deceived as to his status.*

*Quære, also, whether sec. 12 of 12 Vic., ch. 197, has any relation*



to titles previously acquired.—*Herr v. Elliott*, 434.

## AMENDMENT.

*Of petition in Election Trials.*]—  
See ELECTIONS, 3.

See SALE OF LANDS.

## APPEAL.

1. *Appeal from rule nisi.*]—An appeal will not lie from the granting of a *rule nisi* in the County Court before it has been made absolute or discharged.—*Robinson v. Richardson*, 344.

2. *Certifying grounds of decision.*]—It is the duty of a County Court Judge to certify to the Court above on an appeal the grounds of his decision. The statute is not complied with by certifying the decision simply.—*Hayward v. G. T. R.* 392.

## ARBITRATION.

*Award — Separate finding.*]—The plaintiff and defendant agreed to refer all matters touching and concerning all claims and demands whatsoever of the plaintiff against or in respect of the estate of the late T. P. (except as to a specific devise), and all accounts, claims, and demands whatsoever then existing between the plaintiff and defendant as executor of T. P., or otherwise howsoever. The arbitrator awarded that \$4,485 was due from defendant, as executor of T. P. and otherwise to the plaintiff in respect of the matters referred; which sum he directed to be paid, and that when paid, it should be in full satisfaction of all demands by plaintiff against defendant as such executor and otherwise in respect to all matters referred.

*Held*, no objection to the award, that it did not find separately the amount awarded against defendant as executor and in his own right. *Perrin v. Perrin*, 606.

See MUNICIPAL LAW, 2—PLEADING, 6.—RAILWAYS.

## ARSON.

32-33 *Vic. ch. 22, sec. 7 D—“Building,” definition of.*]—The remains of a wooden dwelling house after a fire which left only a few rafters of the roof, and injured the sides and floors so as to render it untenable, and which was being repaired: *Held*, not a building, within sec. 7 of 32-33 *Vic.*, ch. 22, so as to be the subject of arson.—*Regina v. Labadie*, 429.

## ATTACHMENT.

See ATTORNEY, 1.

JUSTICE OF THE PEACE.

## ATTORNEY.

1. *Nonpayment of money—Attachment—Striking off the rolls—Execution.*]—The proper proceeding against an attorney for mere nonpayment of money pursuant to a rule or Court, where there are no special circumstances shewing fraud or dishonesty, is by judgment and execution under C. S. U. C. ch. 24, sec. 15, and not by motion to strike him off the rolls, nor by attachment.

Under the Imperial Act 32 & 33 *Vic. ch. 62, sec. 4, sub-sec. 4*, attorneys ordered to pay money in that character are excepted from the general rule, and may be attached as before. There is no such exception in our Act.—*Re Campbell*, &c., 444.

2. *Action for costs — Statute of Limitations.*]—The plaintiff's attorney sued in 1870 for bills of costs in suits brought for the defendant, in which suits judgment was entered, respectively, in 1860 and 1861, and executions, which were issued in 1863, had been renewed yearly, at defendant's request, until 1870 :

*Held*, that the plaintiffs could not recover for any costs incurred before and in the entry of the judgments; for they were entitled on the recovery of judgment to sue for their bill, and were barred by the statute, which then began to run.

*Harris v. Quine*, L. R. 4 Q. B. 657, distinguished.—*Lizars et al. v. Dawson*, 237.

3. *Action against for negligence.*]—Where an attorney, being employed to get a judgment of *non pros.* signed against the plaintiff set aside, applied through his town agent for an order for that purpose, which was granted on the 16th June, but the agent neglected to take out the order until the 22nd October following, in consequence of which delay the order was set aside and the judgment allowed to stand :

*Held*, that this was negligence for which the attorney was responsible, and that it was no defence that he acted under the advice of counsel.

*Held*, also, that the evidence of defendant's retainer, set out in the report, was clearly sufficient.—*Herr v. Toms*, 423.

## AWARD.

See ARBITRATION.

## BAND INSTRUMENTS.

*Replevin for.*]—See MILITIA.

## BANK DIRECTOR.

See FRAUDULENT REPRESENTATIONS, 1.

BARRISTERS CALLED, 202,  
418, 641.

## BOND.

1. *Restraining execution.*]—The verdict was taken for the plaintiff for \$1000, and 20 cents for the detention on a bond, no evidence of damage having been given. Defendant moved to restrain the execution to 1s, damages, the bond being within the 8 & 9 W. III. ch. 11. *Held*, that such application, before the entry of judgment, was premature.—*Greer v. Johnston*, 77.

See CONTRACT, 4. — PRINCIPAL AND SURETY, 2.

## BOUNDARIES.

See DESCRIPTION OF LAND.— EVIDENCE, 2.—TRESPASS, 1.

## BUILDING CONTRACT.

See CONTRACT, 1.

PLEADING, 2.

## BY-LAW.

*Questioning one not quashed.*]— See MUNICIPAL LAW, 1.

502. *City of Toronto.*]—See MUNICIPAL LAW, 1.

## CARRIER.

See FRAUDULENT REPRESENTATION, 2.

## CERTIORARI.

See JUSTICE OF THE PEACE, 2,

## CHARTER OF VESSEL.

See SHIPPING.

## CHATTEL MORTGAGE.

See INSOLVENCY, 1.

## COMMON COUNTS.

See SALE OF GOODS, 1.  
SALE OF LANDS, 1.

## COMMON SCHOOLS.

*Action by teacher for salary—Want of qualification.*—A school teacher sued the trustees in the Division Court for his salary upon an agreement under defendants' corporate seal, by which they bound themselves to employ the powers legally vested in them to collect and pay him; and upon the common count for work and labor. It appeared that he was not a legally qualified teacher, but that he had taught the school during the time claimed for.

*Held*, that he could not recover:

1. Because by Consol. Stat. U. C., ch. 64, sec. 27, sub-sec. 9, as amended by 34 Vic., ch. 33, sec. 30, defendants were prohibited from giving an order in his favor on the local superintendent, and the latter, by sec. 91 sub-sec 2, from giving him a check upon the treasurer.
2. Because, if entitled to payment, his remedy would be mandamus, or a special action, not by an action for the money, which was not in defendants' hands.

*Quære*, as to the meaning of the 34 Vic., ch. 33, sec. 27, O.—*Wright v. School Trustees of Stephen*, 541.

## CONSIDERATION.

*For contract.*—See INSOLVENCY, 2.

## CONTESTED ELECTIONS.

See ELECTIONS.

## CONTRACT.

1. *Liquidated damages or penalty.* Defendant contracted under seal to do all the carpenter's and joiner's work required in the erection of two dwelling houses for the plaintiff, and covenanted that the work should be ready for the lathing by the 10th of October, and ready for the painter by the 10th of November, and should be fully completed by the 24th of November, under a penalty of \$20 a week as liquidated damages for every week beyond the said time the said works shall remain incomplete.

On the trial Wilson, J., sitting without a jury, construed the contract as one for a penalty, and computed the damages at \$14.86 a week.

On motion to increase the verdict, *Morrison, J.*, held that the \$20 must be regarded as liquidated damages. *Wilson, J.*, adhered to his ruling at the trial. *Richards, C. J.*, being absent, and the Court thus equally divided, the rule dropped.—*Archbold v. Wilson*, 590.

2. *Covenant.*—Plaintiff and defendant entered into an agreement under seal, by which the plaintiff agreed to convey to defendant certain land "for \$300," payable in the manner specified. *Held*, to amount to a covenant by defendant to pay the money.—*Berry v. Garrard*, 173.

3. *Insolvency—Agreement—Construction.*—The creditors of one P., an insolvent, consented by an agreement, that the plaintiff, as guardian of the estate, and the defendant should sell certain timber manufactured by the insolvent, and pay defendant out of the proceeds



\$5,500, which he claimed, upon defendant giving the guardian his bond to repay the same, or so much as defendant might not be entitled to; defendant (it was said in the agreement) claiming such timber, or a lien on it, and the creditors insisting that the estate owned or had some claim thereon. The bond recited this agreement, and the condition was, that defendant should repay such portion of the \$5,500 as he should not be entitled to.

The plaintiff sued on this bond, averring the sale of the timber and payment to defendant of the \$5,500; and that defendant was not entitled to the same, but had not repaid it. Defendant pleaded that he duly established his right to the \$5,500 by filing with the assignee the particulars of his claim thereto, duly verified, as provided by the Insolvent Act of 1869. The plaintiff replied, setting out the particulars of defendant's claim and verification thereof (which shewed it to be the claim in question), and alleged that such claim had not been placed on any dividend sheet, nor in any manner adjudicated or awarded upon. To this the defendant rejoined, that it had not been contested or objected to, and the plaintiff as assignee had not prepared any dividend sheet of the estate.

*Held*, that the rejoinder was good, for that, looking at the position of the parties and the agreement, the meaning of the bond was, that defendant should repay what, after a contestation of his claim, it might appear that he was not entitled to rank for; and the action, therefore, was premature.—*Hall v. Dunsford*, 1.

4. *Construction*—8 & 9 W. III. ch. 11.]—The defendant gave a bond

to the plaintiff in \$1000, reciting that he had that day purchased certain land known as the mill property in the village of P., and fully described in a deed made by one J., and conditioned to convey to the plaintiff all the land in said deed over 2½ acres, being a strip on the western portion of the property, as soon as said land could be surveyed. The deed to J. included over four acres, part of which at the eastern end was covered with water. *Held*, that defendant was clearly not entitled to retain 2½ acres of *dry land*, in addition to that covered with water, but only 2¼ acres of the whole.—*Grier et ux. v. Johnston*, 77.

See INSOLVENCY, 2.—MISJOINDER.—PLEADING, 4.—PRINCIPAL and SURETY.—SALE OF LANDS.

*Proof of by Telegrams.*]—See SALE OF GOODS, 2.

## CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

## CONTROVERTED ELECTIONS.

See ELECTIONS.

## CONVEYANCING.

See COUNTY COURT JUDGE.

## CONVICTION.

See JUSTICE OF THE PEACE, 2.—MUNICIPAL LAW, 1.

## CORONER.

May give certificate of loss by fire where the policy requires certificate to be given by a magistrate.—*Kerr v. B. A. Ass. Co.*, 569.



## CORPORATIONS.

*Directors' liability for fraudulent representations.*—See FRAUDULENT REPRESENTATION.

*Liability of Corporation for acts of agent.*—See LIBEL.—MUNICIPAL LAW.

## CORRUPT PRACTICES.

See ELECTIONS, 1.

## COSTS.

See ARBITRATION, 2.

“ ATTORNEY, 2.

“ ELECTIONS, 2.

“ TARIFF OF FEES.

## COUNTY COURT.

See APPEAL.

## COUNTY COURT JUDGE.

*Consol. Stat. U. C. ch. 15, 29 Vic. ch. 39 — County Judge. — Penal action.*—The Consol. Stat. U. C. ch. 15, sec. 5, as amended by 29 Vic. ch. 30, enacts that no County Court Judge shall directly or indirectly practice in the profession of the law as counsel, attorney, solicitor, or notary public, or as a conveyancer, or do any manner of conveyancing, or prepare any papers or documents to be used in any Court of this Province, under the penalty of forfeiture of office and of \$400.

The declaration alleged that defendant, being such Judge, did in certain proceedings in the Surrogate Court prepare certain papers and documents to be used in said Court, to wit, the petition of one G., &c., (describing the papers). Defendant pleaded that he did not practice in the profession of the law as an attorney for said G., or as such attorney prepare any papers or documents to be used in said Surrogate Court.

The evidence shewed that defendant prepared *gratuitously* for G., who was a widow in poor circumstances, the petition, bond, and affidavits required to enable her to obtain administration to her late husband.

*Held*, that the second plea was proved, and a verdict was therefore entered for defendant on the leave reserved.

Per *Draper, C. J. of Appeal*, and *Morrison, J.*, the evidence did not bring defendant within the spirit of the act, or the mischief against which it was directed, which was the doing the acts prohibited for profit.—*Allen v. Jarvis*, 56.

*Duty of as to appeals.*—See APPEAL, 2.

## COVENANT.

See CONTRACT, 2.

PLEADING, 1, 2.

## CRIMINAL LAW.

See ARSON.

## CROWN PATENT.

*Reservation of trees in—Effect of.*]  
See TROVER, 1.

## CUSTOMS.

See INLAND REVENUE.

## DAMAGES.

See CONTRACT, 1.—PRINCIPAL AND AGENT.—REPLEVIN.—RIGHT OF WAY.—TROVER, 2.

## DEATH, PRESUMPTION OF.

See TAX SALE, 3.

## DEDICATION.

See HIGHWAYS, 2.

## DEED.

*Escrow—Estoppel.*—To a declaration on a covenant for quiet enjoyment in a mortgage to the plaintiffs executed by one T., the defendant's grantee, one defendant pleaded that T. did not, after the making of that deed, convey to the plaintiffs.

The deed from the defendants to T. was dated 22nd June, and the mortgage from T. to the plaintiffs was dated 10th April, 1855. Both were registered on the 28th July; the deed first. It appeared that there were two mortgages from T. to the plaintiffs, on another lot, when this mortgage was made, and instead of which it was given. After executing this mortgage T. found that a deed from defendants to him was necessary to give him the legal title, and he got the deed in question. The two mortgages were not discharged until the 16th August.

*Held*, that the whole transaction shewed that the mortgage was not intended to take effect until the perfecting of T.'s title and the discharge of the other mortgages for which it was given, and that the plaintiffs therefore could recover.

*Held*, also, that if the mortgage had been delivered before the deed, defendants could not have been liable on the ground of estoppel, for the estoppel would apply to T. only, not to defendants.—*Trust and Loan Co. v. Covert et al.*, 222.

See DESCRIPTION OF LAND.—EVIDENCE, 4.—HUSBAND AND WIFE, 1. *Fraudulent.*—See FRAUDULENT DEED.

## DEFAMATION.

1. *Publication by agent of corporation—Privileged communication*—16

*Vic. ch. 99, sec. 10.*—The defendant, being the general manager of defendants' railway, had a handbill printed addressed to the defendants' employees, stating in substance that the plaintiff, a conductor on the road, had been dismissed from defendants' service for dishonest conduct, an envelope having been found addressed by him to a conductor on the New York Central Railway containing tickets used but not cancelled. In an action for libel in the publication of this notice:

*Held*, 1. That such action was not "for any damage or injury sustained by reason of the railway," within 16 Vic. ch. 99, sec. 10, so as to limit the action to six months.

2. That defendants were liable for the publication, as being an act done by their general manager, in the ordinary performance of his duties, although not specially authorized by the directors.

3. That it would have been privileged if distributed only to the employees, or put up in the private offices of the Company where they alone had the right to be; but that the putting it up in defendants' offices and stations open to the public was not justified, and was evidence of malice.—*Tench v. G. W. R. Co.*, 452. [This case has been since reversed on appeal, upon the ground that the communication was privileged.]

4. *Libel—Plea of justification.*—The libel set out in the declaration, for which the plaintiff sued, alleged in substance that the plaintiffs, a Life Assurance Company, had lost heavily on debentures taken at par and nearly worthless, which they had nevertheless continued to value: that they were compelled by public opinion to call in an actuary, but prevented him from making a pro-

per valuation: that their history was one of outrageous extravagance and dangerous debility: that for years they had trembled on the very verge of disaster; and that they were in an unsound and precarious condition, &c.

The plea to the whole declaration alleged only, in substance, that defendants had for several years made untruthful annual statements: that they had lost large sums of money by investments; and that they paid larger bonuses and dividends and salaries than their true financial position would justify. *Held*, that the plea did not justify all the material charges in the declaration, and that it was therefore bad.—*Canada Life Assurance Co. v. O'Loane*, 379.

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### DELAY.

*See* SALE OF GOODS, 2.

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### DESCRIPTION OF LAND.

1. *Boundaries.*—J. L. conveyed to G. L. a piece of land extending 103 feet 6 inches along the south side of Wellington street, easterly, from its intersection with Elgin street, covenanting that should the line of Wellington street be shifted to the north, he would grant to G. L. any land thus left intervening between that street so changed and the land now granted. The south side of Wellington street was shifted about 23 feet to the north, and as Elgin street intersected it at an acute angle, the intersection was about 11 feet further west than before. G. L. having obtained a conveyance in accordance with the covenant:

*Held*, that he was entitled to have his eastern boundary produced on

its original course, at right angles to Wellington street, though he would thus have more than 103 feet 6 inches on the street; for the intention was to give all the land in front of that first conveyed to him, and between it and the street as altered.—*Lang v. Mathewman*, 126.

2. *Water's edge.*—P., owning land on both sides of a stream, conveyed a piece on the south side described as extending "to the water's edge of the creek; then keeping along the water's edge of said creek with the stream until," &c.; reserving a road fifteen feet wide along the bank.

*Held*, to pass the land to the centre of the stream.—*Kains v. Turville*, 17.

*See* TAX SALE.

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### DETINUE.

*See* PLEADING, 3.

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### DIRECTORS.

*See* FRAUDULENT REPRESENTATION.

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### DISCHARGE.

*See* INSOLVENCY, 2.

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### DIVISION COURTS.

*See* JUSTICE OF THE PEACE, 1.

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### DRAINAGE.

*See* PLEADING, 7.

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### EDITOR-IN-CHIEF OF REPORTS.

*Appointed*, 641.



## EJECTMENT.

### *Service of summons—Parties.*]

A summons in ejectment was sued out against defendant J., on the 20th of January, 1871, and served, 1. By nailing a copy to a tree upon the land, which was a wild lot. 2. By serving a copy on defendant's brother, who was not shewn to be defendant's agent, or authorized to accept service for him. 3. By serving a copy on one E. at defendant's late residence. Upon these affidavits an order was made authorizing the plaintiff to proceed by signing judgment for want of appearance, which was done on the 27th of April. Defendant had been in England since December, 1870, and having returned in July, he moved in the next term to set aside the order and judgment signed under it, on affidavit denying that he had ever had possession of the land either by himself or others.

*Held*, that the rule must be absolute: that it was a case of vacant possession, but no reason was shewn for making J. a defendant, and no service binding upon him. *Burnham et al. v. Jones*, 83.

See ALIENAGE.

TAX SALE, 1.

## ELECTIONS.

1. *Corrupt Practices — "Illegal and Prohibited Acts in reference to Elections" — Selling and giving Liquor—Carriage of Voters—Right to reserve questions of law—32 Vic., ch. 21, 34 Vic., ch. 3.*]

—Upon questions reserved by the rota Judge under "The Controverted Elections Act of 1871," it appeared that H. and B. voted for respondent. H. kept a saloon, which was closed on

the polling day, but up stairs in his private residence he gave beer and whiskey without charge to several of his friends, among whom were friends of both candidates, B., who had no license to sell liquor, sold it at a place near one of the polls to all persons indifferently. This was not done by H. or B. in the interest of either candidate, or to influence the election, B. acting simply for the purpose of gain; and the candidate did not know of or sanction their proceedings.

*Held*, (though with some doubt as to B.) that neither H. nor B. had committed any corrupt practices within sec. 47 of 34 Vic. ch. 3. and therefore had not forfeited their votes; for they had not been guilty of bribery or undue influence, and their acts, if illegal and prohibited, were not done "in reference to" the election, which, under sec. 47 of 34 Vic. ch. 3, is requisite in order to avoid a vote.

The words "illegal and prohibited acts in reference to Elections," used in sec. 3, mean such acts done in connection with, or to affect, or in reference to elections; not all acts which are illegal and prohibited under the election law,

The right to vote is not to be taken away or the vote forfeited by the act of the voter, unless under a plain and express enactment, for it is a matter in which others besides the voter are interested.

One M., a carter, who voted for respondent, at the request of P., the respondent's agent, carried a voter five or six miles to the polling place, saying that he would do so without charge. Some days after the election P. gave M. \$2, intending it as a compensation for such carriage, but M. thought it was in payment for work which he had



done for P. as a carter. The candidate knew nothing of the matter.

*Held*, that there was properly no payment by P. to M. for any purpose, the money being given for one purpose, and received for another; but that if there had been, it was made after P.'s agency had ceased, and there was no previous hiring or promise to pay, to which it could relate back.

If such payment had been established as a corrupt practice, it have avoided P.'s vote, but not M.'s; and it would not have defeated the election, for it was not found to have been committed with the knowledge or consent of the candidate, but the contrary.

*Quære*, whether, under 34 Vic. ch. 3, sec. 20, the Judge has power, before the close of the case, to reserve questions for the Court.—*Re Brockville and Elizabethtown Election*, 132.

2. *Costs—Discretion of Master—Fees of witnesses not called.*—In trials under the Controverted Elections Act of 1871, the costs and witness fees, and the materiality of evidence, are in the discretion of the Master, subject to the Court, as in other trials.

The Master will generally be the sole judge as to how many witnesses shall be allowed for as to one issue.

So where the Master allowed fees to seventy witnesses subpœnaed, but not called, on charges of bribery by the petitioner, the election having been avoided on the evidence of other witnesses: *Held*, that the Master exercised a proper discretion, even though respondent's attorney swore he believed the witnesses would have disproved the charges they were called to prove; the facts that each witness

was subpœnaed to prove, appearing on the petitioner's brief put in before the Master, and it appearing also by affidavit that the witnesses were subpœnaed *bona fide*, and were material.

There is no presumption in a trial under the Controverted Elections Act of 1871 arising from the number of witnesses subpœnaed that they are unnecessarily called. The presumption is to the contrary.—*Re Prescott Election*, 303.

3. 32 Vic. ch. 21, secs. 5, 7—*List of Voters not delivered in time—Wrong List used—Effect of—Amendment of Petition.*—The 32 Vic. ch. 21, sec. 7, and sub-sec. 1, enacts that the clerk of each municipality shall, in each year, make from the assessment rolls a list of the persons entitled to vote therein, and deliver it to the Clerk of the Peace on or before the 15th August. By sub-sec. 3, this period shall be directory only to the clerk, "and the said lists shall be valid and effectual for the purposes of this Act, even though not so completed and delivered by the said period of time;" and by sub-sec. 10, no person shall be admitted to vote unless his name appears on the last list of voters, delivered to the Clerk of the Peace "at least one month before the date of the writ to hold such election."

The writ to hold the election was tested on the 25th February, 1871. The list of voters for one of the townships in the Electoral Division was made up from the assessment roll of 1870, and sworn to on the 13th of August; but it was not delivered to the Clerk of the Peace until the 17th March, 1871. The list for 1869 had been delivered on the 19th August of that year.

*Per Richards, C. J., and Morrison,*

*J.*, the list of 1869 was the one which should have been used.

Per *Wilson, J.*, that of 1870 was properly used; for that the month should be construed to mean a month from the 15th August, when the roll should have been, or any earlier day when it may in fact have been, delivered: that the roll, though delivered too late, would not otherwise be "valid and effectual for the purposes of this Act;" and the neglect of the clerk should not be allowed to disfranchise voters.

There were 41 voters on the list of 1869 who were not on that of 1870, but it was not shewn that the vote of any one entitled to vote by either list had been rejected; nor was it shewn or suggested that the use of one roll instead of the other could have in any way affected the result of the election. *Held*, that the election was not avoided.

*Held*, also, that the Judge had power to amend the petition by allowing the insertion of an objection to the roll used.—*Re Monck Election*, 147.

## ESCROW.

See DEED.

## ESTATE.

*For life.*—See WILL, 1. 2.

*Tail.*—See HUSBAND AND WIFE, 1.—WILL, 1, 2, 3.

See MORTGAGE.

## ESTOPPEL.

*Sheriff's sale.*—In ejectment the plaintiff claimed through a deed from *J. M.* to *J.* The defendant claimed through a sheriff's sale under an execution against *J. M.* at the suit of *C.* The deed *J. M.* to *J.* was made 4th Feb., 1857, and *C.*'s judgment against *J. M.* was

entered on 21st June, 1855, and registered. On the 6th July, 1859, the sheriff sold the lands under a *pluries fi. fa.* tested 31st March, 1858.

After the Sheriff's sale, *J.* entered into an agreement with *D.*, the purchaser at such sale, by which *D.* covenanted to convey the land to *J.* on payment of \$743 within five weeks; the agreement to be void on nonpayment. The money was not paid. *D.* conveyed to *M.*, with whom *J.* made an agreement, that on his paying *M.* \$1,200 within a year, *M.* would convey to him: that *J.* might sell within the year, and should have all he could get above \$1,200; and that *M.* should have possession, which *J.* accordingly gave him. After this *J.* conveyed to the plaintiff:

*Held*, that neither agreement estopped the plaintiff from objecting to the title derived under the Sheriff's sale, or from setting up his legal title.—*Morrison v. Steer*, 182.

See DEED—PLEADING, 5.—RIGHT OF WAY.—SURVEY.—TRESPASS, 1, 2, 5.—WILL, 1.

## EVIDENCE.

1. *Husband and Wife*—33 Vic. ch. 13, O.]—In an action by husband and wife for injury suffered by the wife, and for consequential damage sustained by the husband, the wife is not a competent witness under 33 Vic. ch. 13, O.

*Quære*, per *Wilson, J.*, whether a wife joined with her husband for mere conformity under C. S. U. C. ch. 73, sec. 18, would not be admissible, and whether the damages in the present action when recovered would not become her property, under sec. 2 of that Act.—*Toms et ux. v. Corporation of Whitby*, 249. [See now 36 Vic., ch. 128, Ont.]

2. *Leave and License—Proof of plea of.*]—In trespass *quare clausum fregit*, it appeared that about twelve years since one W., defendant's tenant, having moved the fence between plaintiff and defendant, an agreement in writing was entered into between W. and the plaintiff, that they would employ B., a surveyor, to establish the original line between lots 1 and 2, and would be bound by it; and defendant by a memorandum signed by him at the foot of this agreement, agreed to abide by it. The land in dispute was then in W.'s possession, and it was alleged that B. had not completed his survey.

*Held*, no evidence to support defendant's plea of leave and license.

*Held*, also, that upon the evidence, set out in the report B., the surveyor, had proceeded properly to establish the line.—*Crosthwaite v. Gage*, 196.

3. *Parol evidence of land included in bond.*]—Where a bond was conditioned for the conveyance of all land over 2½ acres of land out of a larger quantity referred to, part of which proved to be covered with water, and the defendant contended he was entitled to retain the land covered with water, and 2½ acres not so covered.

*Held*, that parol evidence of the expressions and declarations of the parties as to the land intended, was inadmissible to support the defendant's construction of the bond.—*Greer et ux. v. Johnston*, 77.

4. *Secondary evidence of lost deed—Proof of search—Vesting order in Chancery.*]—The plaintiff in ejectment claimed under a mortgage from C. to O., executed in 1856, C. being called, proved his execution of such a mortgage, and the memorial of it signed by him was

produced from the registry office. He had last seen the mortgage with O., the mortgagee, in 1857. O. in 1869, became an insolvent, and made an assignment of all his estate to F. He absconded to the U. S. shortly after, and was followed by F. It was not shewn that F. had ever had the mortgage, though the land was assigned to him; and it appeared that in a suit against him and O., in Chancery, on behalf of the creditors, commenced many years after the assignment, and which resulted in the appointment of the plaintiff as receiver, F. produced the papers in the suit under an order of the Court, and this mortgage was not among them. A search was proved to have been made in the Master's office, with the plaintiff's solicitor in that suit and among the Receiver's papers, but not with O., who was still living in Michigan, nor with his solicitor in the suit.

*Held*, that the proof of search was sufficient to let in the secondary evidence, for under the circumstances there was no presumption that O. retained the mortgage or took it to the U. S. with him.

*Held*, also, that a vesting order made in the Chancery suit, vesting all the estate of O., including this land, in the plaintiff, was sufficient proof of plaintiff's title, without shewing why it was made.—*Gordon v. McPhail*, 480.

See FRAUDULENT REPRESENTATION.—HUSBAND AND WIFE, 2.—INLAND REVENUE.—INSURANCE.—JUSTICE OF THE PEACE, 2.—NEGLECT.—NEW TRIAL.—PROMISSORY NOTE.—SALE OF GOODS.

## EXCISE.

See INLAND REVENUE.



## EXECUTION.

See ATTORNEY, 1.—TROVER, 2.

## FRAUDULENT DEED.

*Statute of Elizabeth—Sheriff's sale—Registration of judgment—Estoppel.*—In ejectment the plaintiff claimed through a deed from J. M. to J. The defendant claimed through a purchase at Sheriff's sale under execution against J. M., at the suit of one C., and he contended also that the deed from J. M. to J., was void under the Statute of Elizabeth. Both J. M. and J., however, swore that this deed was made in good faith for a valuable consideration; provision was made for paying off C.'s judgment out of the purchase money; and it did not appear that J. M. had any other creditors:

*Held*, That the deed was good.—*Morrison v. Steer*, 182.

## FRAUDULENT REPRESENTATION.

1. *Bank Director—Action against.*—The plaintiff sued defendant as director of a bank, alleging in substance that, in a report made to the shareholders in 1866, and a statement accompanying it, the defendant falsely and fraudulently misrepresented the condition of the bank, over-estimating the assets and under-estimating the liabilities, thereby inducing defendant to believe it sound and to purchase stock. It appeared that the plaintiff, relying on these statements, purchased shares in 1867 at 92 to 95, which he sold at 39. In 1868 the credit of the bank became much impaired, owing, it was said, to the failure of other banks and of customers, and on an examination the capital was found to be reduced by \$300,

000, and the reserve fund, and sum at the credit of profit and loss account, about \$70,000, swept away.

The cashier, who prepared the report and statements complained of, being called by the plaintiff, said these documents were correct, and he had no doubt defendant believed them to be so. As to certain Municipal debentures for \$118,000, bearing interest at 4 and  $4\frac{1}{2}$  per cent., which were placed among the assets at par, though of much less market value, he said they were regarded as so much of the capital invested at a low rate of interest, and the stockholders were so informed at the meeting in 1866. As to many of the assets said to be overvalued, he said he believed the sum reserved in 1866 to meet losses was fairly sufficient, and that the forced sales of property belonging to the bank, made after the examination in 1868, involved great sacrifices. Two of the persons who made that examination said that they thought some of the accounts should have been written off before 1868, but they could not say when or specify the amount, nor tell when the losses were made; another witness, the plaintiff's agent, pointed out several of such debts.

*Held*, 1. That there was no evidence of fraud sufficient to maintain the action—that is, of false statements knowingly made by defendants with a fraudulent intent.

The nature of the fraud required to sustain such a charge considered, and the authorities reviewed.

2. That the report was not a representation within Consol. Stat. U. C., ch. 44, sec. 10, so as to require it to be signed by defendant.

3. That if the statements were false and fraudulent, defendant



would be liable, although they were made to the stockholders, for they were intended and used for public information.—*Parker v. McQuesten*, 273.

2. *Pleading, Scienter.*]—The declaration alleged that the defendant, before the committing of the grievances, &c., was a carrier and express agent; that the plaintiff delivered to one W. a sum of money to be handed to defendant, to be carried and delivered to S., and that defendant falsely and fraudulently represented to the plaintiff that W. had delivered said money to him, whereby the plaintiff was satisfied of the fact, whereas in truth it had not been so delivered, but appropriated by W. to his own use; and by reason of such false and fraudulent representation W. obtained time to, and did abscond, and the plaintiff lost said money, which he would otherwise have recovered from W.

*Held*, on demurrer, that a sufficient cause of action was shewn; that it was unnecessary to allege that defendant knew the representation to be false, the words *falsely* and *fraudulently* being equivalent to *knowingly*; or that defendant was a carrier at the time when, &c., for, the ground of action being the fraud, his being a carrier was immaterial.—*Young v. Vickers*, 385.

## HIGHWAYS.

1. *Intersection of cross roads—Liability to keep in repair.*]—*Held*, that it is the duty of the owners of a road constructed by a Joint Stock Company to keep it in repair at its point of intersection with cross roads, even although such repairs may interfere with the cross road. *Bradley v. Brown and Street*, 462.

2. *Highway established by Quarter Sessions*—50 Geo. III., ch. 1—*Omission to confirm at the next Sessions.*] By 50 Geo. III., ch. 1, sec. 3, upon application in writing to a surveyor of highways, by twelve freeholders, for the opening of a new road, he is required to examine the same and report thereon in writing to the Justices, “at their next ensuing Quarter Sessions,” giving public notice of such report as specified, and in the absence of any opposition “it shall and may be lawful for the said Justices” and they are required to confirm said report, and to direct such road to be opened; and when any application shall be made to the said Justices in Q. S. assembled as aforesaid in opposition to said report, they are to empanel a jury out of the persons returned to serve as jurors at said Sessions to determine the question, &c.; and such road so opened shall be a public highway.

The report was dated 3rd July, 1837, and the notices given stated that it would be laid before the Q. S. on the 11th. So far as appeared, however, nothing was done at the July Court, but the report was confirmed at the October Sessions following.

*Held*, that the highway had not been legally established, the power of confirmation being confined to the Sessions next after the report; and that the fact of user was immaterial, the presumption of dedication being rebutted by the proof of the origin of the road.—*Regina v. G. W. R. Co.*, 506.

See NEGLIGENCE, 1.

## HUSBAND AND WIFE.

1. *C. S. U. C. ch. 83, sec. 44.*]—The 44th section of the Consol.

Stat. U.C. ch. 83, "An Act respecting the assurance of estates tail," applies only to cases arising under that statute, and does not authorize the Court in every case where a husband is living apart from his wife, to dispense with his concurrence in a conveyance by her.—*Re McIlroy*, 95.

2. *Necessaries—Evidence.*]—In an action by a tradesman against a husband for the value of goods supplied to his wife whom he has without cause turned out of his house, the question is, whether the articles furnished were really necessary, and to disprove this defendant may shew that she had been already supplied by others with similar goods.—*Archibald v. Flynn*, 523.

See EVIDENCE, 1.

## INDENTURE.

*Setting out verbatim.*]—See PLEADING, 2.

## INLAND REVENUE.

*Detinue—"Spirits," meaning of—Old Tom Gin—Inland Revenue Act, 31 Vic. ch. 8, D—Seizure—Probable cause.*]—Plaintiffs manufactured in Montreal some Old Tom Gin, &c., which they sold and shipped to Guelph to J. & H., no permit accompanying it. The casks were branded as if manufactured in London, England; but the invoice received by the consignees from the plaintiffs, and handed to the officers, shewed that the goods came from the plaintiffs, and described the plaintiffs as distillers, &c. The defendants as officers of Inland Revenue seized and detained the goods for want of a permit, but subsequently, upon its being

shewn at Ottawa that the goods were manufactured from spirits which had paid duty, they, by instructions, offered to release the goods on payment of costs of seizure.

*Held*—1. That Old Tom Gin was spirits, within the Inland Revenue Act, 31 Vic., ch. 8, D, for the admixture of flavoring essences, &c., did not deprive it of its character, and, whether imported or manufactured in Montreal, a permit was required.

2. That, under the circumstances set out, the defendants had reasonable and probable cause for believing the goods were being unlawfully removed, and for seizing them.

3. That the seizure being so justified, and no permit obtained, the refusal to deliver up, except on payment of costs, could not make defendants liable.—*Winning v. Gow et al.* 528.

## INSOLVENCY.

1. *Insolvent Act of 1869—Chattel Mortgage—Rights of Mortgagee.*]—Where goods were mortgaged, and after default remained with the mortgagee, who made an assignment in insolvency, and handed them over to his assignee; *Held*, that the mortgagee could not take them out of the assignee's possession, but must enforce his claim under the Insolvent Act, and that he was a trespasser in so taking them.—*Dumble v. White*, 601.

2. *Insolvent Acts of 1864 and 1869—Effect of discharge under.*]—An antecedent debt in respect of which an insolvent has duly received his discharge under the Insolvent Acts of 1864 and 1869, is a continuing debt in conscience, and

a sufficient consideration for a new promise to pay it.—*Austen v. Gordon*, 621.

See CONTRACT, 3.  
INSURANCE, 1.

## INSURANCE.

1. *Action by assignee in insolvency—Magistrate's certificate of loss.*—An insurance policy required persons sustaining loss to produce a certificate under the hand and seal of a magistrate, stating (among other things) that he was acquainted with the character and circumstances of the assured or claimant, and that he verily believed that he, by misfortune, and without fraud or evil practice, sustained loss and damage on the subject insured to the amount certified. The action was brought by K., the official assignee in insolvency of W., the insured, who became insolvent after the loss.

The certificate stated that the magistrate was acquainted with the character of W., and that he verily believed that the claimant, K., had, as such assignee, without fraud or evil practice, sustained loss and damage by the said fire to the extent of \$2,500.

*Held*, clearly insufficient, for it was consistent with the magistrate's belief that the fire occurred through W.'s fraud or evil practice, and it did not state that K. had sustained the loss on the subject insured, but only by the fire.

A coroner is a magistrate who may give such certificate.—*Kerr v. British America Assurance Company*, 569.

2. *Rejection of evidence—Effects of two-thirds clause in policy.*—In an action on a fire policy, it appeared that among the questions

answered by the agent of the Company on effecting the insurance was one, "Had the applicant ever had any property destroyed by fire, and under what circumstances? was it insured, and in what office," to which the agent answered that the plaintiff had never before had property destroyed by fire that he had heard of. *Held*, that the plaintiff, as a witness on his own behalf, might be asked on cross-examination as to what passed between him and the agent on this subject, but that the plaintiff's answer would be conclusive.

Where a separate insurance is effected on separate properties the insured can recover two-thirds only of the particular property injured.—*McCulloch v. Gore District Mutual Fire Ins. Co.*, 610.

## INTEREST.

See JURY EXPENSES.

## INTERPLEADER.

*Postponing trial of issue.*—See PRACTICE AT NISI PRIUS.

## JUDGMENT.

*In ejectment—Effect of in evidence*—See TRESPASS, 2.

*Registration of.*—See SHERIFFS' SALE.

## JURY EXPENSES.

*Action by County against City for jury expenses*—18 Vic. ch. 130, C. S. U. C. ch. 31, secs. 155-57.]—Plaintiffs sued defendants under 18 Vic. ch. 130, and Consol. Stat. U. C. ch. 31, secs. 155, 157, for the proportion of jury expenses payable by defendants, from 1855 to 1869 inclusive.

In a special case stated by an arbitrator it appeared that the



amount claimed for 1855 and 1856 had been paid in 1856, but the sums paid to jurors for attendance at Quarter Sessions had been omitted in making up the account for this and other years. The deficiency thus caused the plaintiffs demanded in 1868. *Held*, that it could not be recovered, for the sums claimed were not annually ascertained, determined, and demanded, as required by the statute.

As to 1857 and 1858, accounts were made up by the County Treasurer for the use of a committee of the County Council, appointed to confer with the City Council, shewing the sums due for each of these years, respectively, which sums were verbally demanded by the County Treasurer from the City Chamberlain, in the year following that for which they were payable. The sum demanded for 1858 had been levied by the defendants in 1860, but not that for 1857. *Held*, that the plaintiffs might recover for both years.

As to 1859, a similar account was made up. There was no proof that it had been demanded, but defendants had levied the sum claimed for that year in 1860. *Held*, recoverable.

As to 1860 to 1864, inclusive, in 1860 a special agreement was made between the Counties and City, which the City Chamberlain asserted included defendants' portion of the jury expenses, and so nothing was demanded for these years until 1868, the County Treasurer believing that it would be useless. *Held*, not recoverable, because the sums were not annually ascertained, determined, and demanded.

As to 1866, the plaintiffs demanded and received \$877 for that year, in June, 1867, but the whole

sum paid to jurors at Quarter Sessions and County Courts was omitted in making up the account. In April, 1868, the deficiency thus caused was demanded. *Held*, recoverable.

As to 1867 and 1868, defendants in 1868 levied the sum due for 1867, but applied it to other purposes. In 1869 they levied the sums due for 1867 and 1868, and paid it in September, 1869, but without interest, which the plaintiffs demanded. *Held*, that such interest was recoverable.

As to the year 1869, *Held*, affirming the previous decision in this case, 30 U. C. R. 584, that for the purposes of ascertaining these expenses, as for all other purposes, the assessed value of the city property must be its actual value as assessed, the rule given in C. S. U. C. ch. 31, sec. 155 being no longer applicable.—*Corporation of Frontenac v. Corporation of Kingston*, 348.

## JUSTICE OF THE PEACE.

1. C. S. U. C. ch. 19, sec. 198, *Action against—Notice of action—Attachment—Neglect to file affidavit*—A notice of action in trespass under the Division Courts Act, Consol. Stat. U. C. ch. 19, sec. 193, *Held*, insufficient, for not stating the time and place of the alleged trespass.

There is no substantial difference in this respect between the form of notice required under that Act, and under Consol. Stat. U. C. ch. 126.

Defendant, a Justice of the Peace, issued a warrant of attachment under the Division Courts Act, sec. 199: *Held*, that it was unnecessary, in order to give defendant jurisdiction, that the affidavit should be



filed with the Clerk, though his neglect to do so might be a breach of duty.—*Moore v. Gidley*, 233.

2. *Certiorari*—*Summary conviction*—*Reducing evidence to writing*.]—*Semble*, that it is the duty of a magistrate, at a trial under his summary jurisdiction, to take the examination and evidence in writing.

Where a magistrate, on a summary trial, took no written depositions, but the conviction returned to a *certiorari* set out the evidence: *Held*, in the absence of anything to shew that there was any other or different evidence given, that the return must be taken to be a true and full statement.

*Semble*, that had there been proof of any other or different evidence given, the magistrate might have been required to return it, or to amend the conviction by setting it out.—*Regina v. Flannagan*, 593.

3. *Coroner*—*Insurance*—*Certificate of loss by fire*.]—A coroner is a magistrate who may give a certificate of loss required by a policy of insurance.—*Kerr v. The British America Assurance Co.*, 569.

## JUSTIFICATION.

*Plea of*.]—See PLEADING, 7.  
TRESPASS, 2.

## LEASE, CONSTRUCTION OF.

*Ejectment*—*Lease*—*Construction of*—*Deduction of rent*.]—Plaintiff on the 30th December, 1867, leased two mills to one T., called the Oatmeal Mill and the Erin New Mill, for ten years, at \$1,000 per annum, payable half-yearly in advance, on the 15th of June and December, with a covenant for re-entry on non-payment, and a proviso that if the Oatmeal mill was burned there

should be a reduction of \$400 per annum in the rent, and if the New Mill was burned a reduction of \$600 per annum, and if both were destroyed the term should cease, and only the proportion of rent due at the time of destruction be paid. The New Mill was burned on the 30th of October; the rent up to the 15th of December of that year having been paid in advance.

*Held*, that the lessee was not entitled to the reduction of \$600 a year for the period from the 30th of October to the 15th of December, for which he had already paid; and that having insisted upon retaining for such reduction out of the rent falling due on the 15th December, he had incurred a forfeiture by non-payment of his rent.—*Cornock v. Dodds*, 625.

## LANDLORD AND TENANT.

See LEASE.—NUISANCE.

## LEAVE AND LICENSE.

See EVIDENCE, 2.—PLEADING.

## LIBEL.

See DEFAMATION.

## LIEN.

*Of a packer*.]—A packer has a lien upon the goods packed by him for the materials used, and work done in packing.

The plaintiff employed one B. to pack some furniture, and send it to him by defendants' railway. B. did so, and received his charges for packing from defendants, who were authorized by him to collect them.

*Held*, that the defendants could legally retain the goods for these

charges as well as for their freight, and that B.'s lien was not lost by delivering the goods to defendants for carriage subject to it, or by accepting the charges from defendants.—*Hayward v. Grand Trunk Railway Co.* 392.

## LIMITATIONS, STATUTES OF.

See ATTORNEY, 2.—LIBEL.

## LIQUIDATED DAMAGES.

See CONTRACT, 1.

## LIQUOR.

*Selling or giving.*—See ELECTIONS, 1.

## MAGISTRATE.

See JUSTICE OF THE PEACE.

## MARKSMAN.

*Proof of signature to note.*—See PROMISSORY NOTE.

## MARRIED WOMAN.

See HUSBAND AND WIFE.

## MASTER.

*Discretion of as to costs.*—See ELECTIONS, 2.

## MESNE PROFITS.

See TRESPASS, 2.

## MILITIA.

*Band instruments of battalion—Right of property in—Notice of action*—27 Vic. ch. 3—31 Vic. ch. 40, sec. 89.]—In replevin for certain instruments forming part of the band of a militia battalion, bought by

the commanding officer, it appeared that the instruments had been purchased partly by money voted by the city corporation, partly by general subscription, and partly by donation of the officers and men of the battalion. Some difficulty having arisen amongst the officers, one defendant refused to give up the instruments, alleging his right to hold possession, as being president of the band committee, and the other defendants acted with him.

*Held*, 1. That under sec. 48 of 27 Vic. ch. 3, the instruments became the property of the commanding officer, who might maintain replevin for them; and that this section, as to such property, was in no way controlled by section 47.—*Lewis v. Teale et al.*, 108.

## MISJOINDER OF CAUSES OF ACTION.

The plaintiffs sold to defendant by deed the right to manufacture and sell their patent right for "Kinney's Metallic Waggon Seat," for the time in the patent mentioned. Defendant covenanted to manufacture at least twenty per day, and as many more as the demand should require, paying each of the plaintiffs one half of a royalty of 25c. on each seat, and further, to supply McK. & Co. with at least 200 seats per month 95c. each, pursuant to an agreement between them and the plaintiffs, paying for these a royalty of 20c. to the plaintiffs.

The declaration was *held* bad, for a misjoinder of causes of action, being for royalties payable severally to the plaintiffs, and also for other royalties payable to them jointly.—*McGivern et al. v. Turnbull*, 407.

## MORTGAGE.

*Right of action on the covenant.]*

—Defendant being seized in fee of land mortgaged it to H. in 1867. In January, 1868, an attachment in Insolvency issued against him, and in May following he gave a second mortgage to the plaintiff. H. filed a bill to foreclose W., defendant's assignee in insolvency, and the Master's report in the suit treated the plaintiff as an encumbrancer. The plaintiff assigned his mortgage to H., and W. assigned the equity of redemption to G. pending the foreclosure suit, but after the report had become absolute G. paid to H., part of the money due on defendant's mortgage, and received an assignment from him and release of the land from their mortgage. It was contended that H. having disabled himself from reconveying to the defendant could not, as beneficial plaintiff, recover from him the balance of the mortgage money, but

*Held*, otherwise; for defendant having conveyed nothing by the mortgage, his equity of redemption being then vested in W., could have nothing to get back.

The replication setting out the facts as above stated having been proved: *Held*, that the plaintiff should have had a verdict, without reference to its validity in law as an answer to the plea.—*Ryan v. Wilson*, 553.

*See* DEED—INSOLVENCY.

## MUNICIPAL INSTITUTIONS

*See* MUNICIPAL LAW.

## MUNICIPAL LAW.

1. *Municipal Act of 1866*, sec. 296, sub-secs. 20, 21—*Powers of Municipality*

*under—Questioning by-law not quashed—Form of conviction for offence against by-law.]—A municipality, under sec. 296, sub-secs. 20, 21 of the 29-30 Vic. ch. 51, may pass by-laws relating to nuisances not of a public character.*

By-law No. 502 of the City of Toronto relative to the public health of the City, secs. 10, 12, 27, 28, 29 and 30: *Held*, invalid.

On an application to quash a conviction for something done contrary to a by-law, the legality of the by-law may be questioned though it has not been quashed. Sec. 205 applies only to actions brought for acts done under an illegal by-law.

Such a conviction must shew by what municipality the by-law was passed. *Quære* whether it is essential to state the title or date of the by-law.

All persons in a municipality, whether permanent residents or not, are bound to take notice of its by-laws.—*Regina v. Osler*, 324.

2. *Municipal Corporations--Trespass by—Justification—Drainage—Municipal Act, 1866, sec. 325—Arbitration.]—Declaration—First count: Trespass to plaintiff's land (lot 15, 14th concession of Enniskillen), and digging a ditch thereon. Second count: That defendants wrongfully dug a ditch in the highway near plaintiff's land, and by means thereof flooded it with water. Third count: That defendants had dug a ditch in the highway near and extending across plaintiff's land, through which water flowed; and defendants so negligently constructed and continued said ditch, and permitted so much water to run in it, that it overflowed upon plaintiff's land.*



**Plea:** That, before the alleged grievances, by a by-law duly passed, defendants authorized the township engineer to enter upon said lot and survey with a view to construct a drain from the highway between it and lot '16, and to acquire the land necessary therefor: that the engineer, having made a survey, reported that it would be requisite to open a drain upon said lot, and the plaintiff was duly notified that the land specified was required for that purpose: that a copy of the by-law was served on him, and the drain dug: that after a month the plaintiff, although requested, not having appointed an arbitrator to determine his compensation, defendants by another by-law appointed W. their arbitrator, and notified the plaintiff thereof, and to name his arbitrator within a month, or that application would be made to the County Court Judge, according to the statute: that the Judge, by order reciting that the plaintiff had omitted to name an arbitrator, although the defendants had taken out the necessary steps, appointed L., W. having refused to act, to determine the matter, of which the plaintiff had notice: that L. awarded \$80 to the plaintiff as compensation for his land taken by defendants for said purposes, which was duly tendered; and that in cutting the ditch the defendants unavoidably injured and threw water on the lot, doing no unnecessary damage.

**Held,** on demurrer, that the plea was no answer to the third count, which complained of injury caused by defendants' negligence; but that it was a sufficient defence to the other counts, without reference to the validity of the award, for it shewed a case in which the plain-

tiff could only claim compensation under the statute, and the defendants had a right to enter and take the land before arbitrating.

*Semble*, however, that the plea shewed a legal award under the Act, the arbitrator's appointment, under the circumstances stated, being authorized by the statute.—*Stonehouse v. Corporation of Enniskillen*, 562.

See JURY EXPENSES.

## NECESSARIES.

See HUSBAND AND WIFE, 2.

## NEGLIGENCE.

1. *Contributory negligence.*—Action against defendants as owners of a macadamized road, which it was alleged they allowed to get out of repair at its point of intersection with another road, whereby the plaintiff was thrown out of his waggon, &c. It appeared that the plaintiff was driving a high load of empty barrels, in a rack unfastened to the waggon, and that on coming to this spot, where the road was lower on one side than the other by 18 inches, so as to carry on the incline of a cross road, and which had deeper ruts on the lower side than on the higher, the plaintiff got on the high side of the load to steady it; the load was upset, and the plaintiff was thrown down and broke his leg. Several questions were submitted to the jury, and in answer to (1) whether the injury to plaintiff happened in consequence of any defect in the road, they answered, "by getting into a rut, and by the slant in the road." They also declared (2) that the accident did not happen in consequence of the height of the load or of the



wind ; (3), that it was not prudent for the plaintiff to have driven over the spot in question on the top of the load ; (4), that the plaintiff sitting as he did contributed to the causing of the accident ; (5), that it was imprudent not to fasten the rack, and the omission to do so contributed to the accident ; (6), that the defendants could not have remedied the defect in the road without going beyond the limits of their road ; but (7), that they might by going on the cross road have remedied at a reasonable outlay the defect in their road.

*Held*, that the answers of the jury to the first, second, sixth, and seventh questions amounted to a finding that defendants' road was out of repair, and dangerous to the public : that the answers to the third and fourth questions, though shewing some negligence on the plaintiff's part, did not amount to a finding of contributory negligence, so as to prevent his recovery ; but that the answer to the fifth question was a finding of contributory negligence, which would bar the action. —*Bradley v. Brown et al.* 463.

2. *Boom on Ottawa river—Injury by collision with steamer—Contributory negligence.*—About one-third of a mile above Snow Rapid, on the Ottawa, there are two booms owned by the Government, extending from the north and south side of, and meeting at a capstan in the river, and another boom extends from the capstan down the stream to an island at the head of the rapid, thus dividing the river into two channels, of which the northern one was used by boats, and the other for running logs.

The plaintiff had a pocket boom on the south side, into which he was running his logs, and he had

nearly closed the Government boom above it for this purpose, thus wrongfully obstructing the navigation.

When the defendants' steamer arrived at the south Government boom on her way down, it was not sufficiently open, and she struck and broke it about forty feet from the end, by which a number of the plaintiff's logs gathered above it, escaped, and were lost.

The plaintiff charged as negligence that the steamer came to within 150 yards of the boom before slackening speed, and then did not reverse her engine. On the other hand, it appeared that the defendants had sent notice to the plaintiff the night before that the boat would be down next day, being the 15th April, and the first trip of the season : that it was the custom to have the boom open for her without waiting, which she could not safely do so near the rapid : that when the accident happened the plaintiff was controlling the boom with rope attached, instead of letting it swing open freely ; and that until the boat came in sight, half a mile off, the plaintiff did not begin to get the rope ready by putting a chain on it to sink it under the vessel.

*Held*, there was at least contributory negligence on the plaintiff's part, if indeed the whole blame was not his ; and that he could not recover.

*Quære*, as to the correctness of a nonsuit upon one of two counts.—*Brace v. Union Forwarding Co.*, 43.

3. *Contradictory evidence—Nonsuit.*—The defendant having charge of the plaintiff's colt, took it to a blacksmith's shop to be shod for the first time, and having tied it there went out. The colt pulling back threw itself, and received in-

juries of which it died. The plaintiff sued defendant for negligence in so tying the colt instead of having it held while being shod; and several witnesses were of opinion that what defendant had done was improper, while others thought he had adopted the proper plan.—*Held* not a case in which there should be a nonsuit on the ground that the evidence was consistent either with the existence or non-existence of negligence, but that the question was for the jury.—*Cotton v. Wood*, 8 C. B. N. S. 568; *Jackson v. Hyde*, 28 U. C. R. 294, distinguished.—*Henderson v. Barnes*, 176.

See ATTORNEY, 3.

## NEW ASSIGNMENT.

See PLEADING, 3.

## NEW TRIAL.

*Judge expressing his opinion on the evidence.*—It is no ground for a new trial that the Judge expressed his opinion strongly upon the evidence in favor of either side.—*Dougherty v. Williams et al.*, 215.

## NISI PRIUS.

See PRACTICE AT NISI PRIUS.

## NON-PAYMENT.

*By attorney.*—See ATTORNEY, 1.

## NON-RESIDENT LAND.

See TAX SALE, 2.

## NONSUIT.

See NEGLIGENCE, 2, 3.

## NOTICE OF ACTION.

*Replevin—Band instruments.*—In replevin, for certain band instruments of a militia battalion, bought by the commanding officer, it appeared that the instruments had been purchased partly by money voted by the city corporation, partly by general subscription, and partly by donation of the officers and men of the battalion. Some difficulty having arisen amongst the officers, one defendant refused to give up the instruments, alleging his right to hold possession, as being president of the band committee, and the other defendants acted with him. *Held*, that defendants were not entitled to notice of action under 31 Vic. ch. 40, sec 89, for that statute had no application; but that if it had, there could be no right to such notice in replevin; and the finding of the jury, that defendants did not honestly believe that they had the power under the statute to do what they did, would also disentitle them to the notice.—*Lewis v. Teale et al.* 108.

See JUSTICE OF THE PEACE.

## NUISANCE.

*Liability of agent of landlord.*—An agent merely to let or receive rents is not liable for a nuisance upon the premises let by him. *Quære*, as to the liability of a general agent clothed with power to let, repair, &c., and in all respects to act for the owner.

If a nuisance existed at the time of letting, both tenant and owner are liable. If it arises after the tenancy is created, the tenant only is responsible.—*Regina v. Osler*, 324.

See MUNICIPAL LAW, 1.

## PACKER.

*Lien of.*—See LIEN.

## PARLIAMENTARY ELECTIONS.

See ELECTIONS.

## PAROL EVIDENCE.

See EVIDENCE, 3.

## PARTNERSHIP.

See PLEADING, 5, 6.

## PASSENGERS' LUGGAGE.

*What is—Liability for loss—Railway.*—The plaintiff, a carpenter, had with him, as a passenger by defendants' railway, a box containing a concertina, a rifle, a revolver, two gold chains, a locket, two gold rings, a silver pencil case, a sewing machine, and a quantity of tools of his trade, such as chisels, planes, &c. The box having been lost at the Toronto station while in defendants' care :

*Held*, that the articles in italics were ordinary personal luggage, for which the defendants were responsible, but that the others were not: *Wilson, J.*, dissenting as to the concertina.

*Held*, also, that the fact of the other articles being in the box could not prevent the plaintiff from recovering for such as were personal luggage.—*Bruty v. G. T.R. Co*, 66.

## PENAL ACTION.

See COUNTY COURT JUDGE.

## PENALTY.

See CONTRACT, 1.

## PETITION.

*In controverted election trial, amendment of.*—See ELECTIONS, 3.

## PLEADING.

1. *Accord and satisfaction by parol—Action on covenant.*—The plaintiffs sold to the defendant by deed the right to manufacture and sell their patent right for "Kinney's Metallic Waggon Seat," for the time in the patent mentioned. Defendant covenanted to manufacture at least twenty per day, and as many more as the demand should require, paying each of the plaintiffs one-half of a royalty of 25c. on each seat, and further, to supply McK. & Co. with at least 200 seats per month at 95c. each, pursuant to an agreement between them and the plaintiffs, paying on these a royalty of 20c. to the plaintiffs. There were other covenants by defendant to manufacture in a workman-like manner, &c., and to make use of all means to introduce the seats and make them known. The declaration set out the deed, and assigned breaches of all the covenants.

The third plea was, that after breach, it was agreed between the plaintiffs and defendant that they should release each other from the performance of their respective covenants, and all rights of action in respect thereof, and in consideration thereof defendant agreed to manufacture thenceforth only so many seats as would supply the demand, and the plaintiffs accepted such agreement in satisfaction of the cause of action declared on. *Held*, bad, as being pleaded to the whole cause of action, whereas it could only be an answer to the breaches of the covenant and not to the covenant itself, for it shewed no release, but only an agreement for one, and no satisfaction by deed; and because the satisfaction was insufficient, the



new agreement being merely to manufacture a less number of the same article in the same way, and on the same terms.

The fourth plea, on equitable grounds, alleged that, in consideration that defendant would release the plaintiffs from performance of said covenants on their part, and from all causes of action in respect thereof, the plaintiffs agreed to release defendant from performance of said covenants on his part, and that defendant accordingly did release the plaintiffs from the performance of said covenants on their part. *Held*, bad, for not averring a release of the plaintiffs from all causes of action; and because such a verbal concord under these circumstances could be no defence in equity, unless the plaintiffs accepted the release or by their conduct and acquiescence led defendant to believe the first agreement at an end.

The thirteenth plea, averring that the second agreement was made in consideration that the defendant would not avail himself of a right he possessed under the first deed to put an end to it by giving a sixty days' notice to plaintiffs: *Held*, a good plea on equitable grounds.—*McGivern v. Turnbull*, 407.

2. *Building contract—Declaration on indenture—Plea, setting it out in full—Demurrer—Construction.* ]—The plaintiffs declared on a building contract under seal, by which they covenanted to do certain work for defendants, to be paid for as the work should progress upon the written certificates of the overseer in charge; and they averred that defendants covenanted by it that the overseer should give such certificates when the plaintiffs were

entitled thereto, alleging a breach of this covenant by defendants.

Defendants pleaded that the agreement was as follows, setting it out verbatim, and making no further averment; to which the plaintiffs demurred.

*Held*, that defendants had taken the right course in so pleading: that the plaintiffs by demurring had admitted the contract declared on to be as alleged in the plea; and that the question, whether it sustained the declaration, was thus properly raised.

The contract was for the performance of certain specified work at a price named, in conformity with the instructions of one H. the overseer of the works. By it H. was made sole judge as to the state and completion of the work, and generally as to any question arising under the contract; he was empowered to reject any materials which he might think fit, to employ others in the event of the plaintiffs not using sufficient despatch, and no payments were to be made without his written certificate:

*Held*, that there was clearly no such covenant by defendants as alleged in the declaration, and that they were entitled therefore to judgment upon the demurrer.—*Kempster et al. v. Bank of Montreal*, 87.

3. *Detinue—Leave and License—Revocation—New assignment.* ]—Detinue for the keys of plaintiff's dwelling house. Plea: leave and license. Second replication: that before the detention the plaintiff revoked the alleged leave, of which the defendant had notice. Rejoinder: that within a reasonable time after the revocation and notice of it, defendant re-delivered the keys to the plaintiff, who accepted them.



*Held*, replication and rejoinder both good.

The word *detained* in a declaration means an adverse detention, and it is unnecessary, therefore, to plead leave and license specially.

Third replication: that defendant, as sheriff, entered the house with the plaintiff's consent, to levy under a *fi, fa*, against the plaintiff's goods, having first obtained the keys for that purpose; and that in excess of his duty as sheriff, he detained the keys from the plaintiff, and locked him out of his house for several days, whereby the plaintiff suffered the injuries complained of in the declaration. *Held*, replication good as being in the nature of an informal new assignment.—*Bain v. McDonald*, 190.

4. *Contract to build railway—Independent enactments—Principal and surety—Substituted agreement—Reservation of remedies.*—Declaration upon defendant's bond, conditioned for the performance by one D. of his agreement, under seal, to construct a railway for the plaintiffs, to be completed by the 15th February, 1871, or within such further time as might be allowed; first breach, failure to complete by the 15th February; second breach, failure to complete within the extension of time allowed.

Plea to the first breach, that by the agreement the plaintiffs promised to pay D. for the works \$290,000, of which \$100,000 was to be paid in mortgage bonds of the plaintiffs, and the rest as specified, but ten per cent. was to be retained out of each payment of bonds until the completion of the work, and then to be paid with the last payment; and that although the plaintiffs made certain payments according to the contract, they failed to

make the residue, whereby D. was and is prevented from completing the work.

*Held*, plea bad, for the covenants were independent, and non-performance by the plaintiffs was no defence.

Equitable plea to second breach: that during the extension of time the plaintiffs, with D.'s consent, agreed in writing with one E. that E. should complete the contract between D. and the plaintiffs, with such changes as the plaintiffs and E. should agree upon; and thereupon D. abandoned the contract, before any breach thereof, and left the works, which E. took possession of.

Replication: that by the agreement with E. it was expressly stipulated that all the plaintiffs' rights and remedies against D. and defendant as his surety, for the non-performance of D.'s contract, should be reserved.

*Held*, replication bad, for the contract with D. being abandoned before breach, there could be no remedies upon it to reserve:

*Held*, also, no objection, in equity, that the new agreement with E. was not under seal.—*Port Whitby and Port Perry Railway Co. v. Dumble*, 36.

5. *Claim against partners—Dissolution—Acceptance of note of the new firm—Stamps—Estoppel—Pleading.*—Declaration against R. & H. for goods sold. Plea by defendant H., on equitable grounds, in substance, that he and R. purchased the goods while in partnership: that afterwards he retired, W. taking his place, and R. & W. assuming the debts of the old firm, including this claim; and that the plaintiff, being aware of this arrangement, took the note of the new firm, R. & W., for his debt. *Held*, a good plea.

The third plea alleged that the plaintiff had notice of the arrangement, as in the former plea; and that, in consideration that W. would assume the liability of H. for this debt, the plaintiff accepted R. & W. in place of defendants, and took their note, and relinquished his claim against H. *Held*, good.

The fourth plea averred satisfaction of the plaintiff's claim by the delivery and acceptance of the note of R. & W. *Held*, clearly good.

The plaintiff replied to these pleas, that the note was not duly stamped, the stamps thereon not having been properly cancelled. *Held*, bad, for the plaintiff could have made the note valid by affixing double stamps, and could not take advantage of his own neglect to do so.—*Watts v. Robinson*, 362.

6. *Promissory Note—Partnership transactions—Consideration—Pleading.*—To an action upon two promissory notes against the maker by the endorsee of the payee, K., the defendant pleaded that the notes were given when he and the plaintiff and K. were in partnership, and in respect of transactions between defendant and K. as partners, and of matters involved in the said partnership, and with the understanding and agreement between defendant and K. and the plaintiff, that the notes were to be held by K. and the plaintiff merely as evidence of such transactions, &c., and as security for any sums which might be found due to K. or the plaintiffs, on account being taken and settlement made between them and defendant as partners, and upon the terms and condition of such an account being taken at or after the dissolution of the partnership; but that the partnership had

since been dissolved and no such account taken or settlement made. *Held* on demurrer, plea bad, for it admitted a good consideration for the notes, and did not allege expressly that they were not to be sued upon.

*Semble*, that it was also defective in not negating any other consideration than that appearing on its face.—*Stultzman v. Yeagley*, 630.

7. *Trespass to land—Public Works Act, 32 Vic. ch. 28, O.—Justification under—Pleading.*—Declaration for trespass to plaintiff's land, and throwing down the fences, hauling earth, and stopping up the water-courses thereon.

Plea, that before the commission of the alleged grievances the Commissioner of Public Works for Ontario, under and in pursuance of 32 Vic. ch. 28, O., had taken possession of said land, fences, and water courses, the same being in his judgment necessary for the construction of a certain drain, being a public work within said Act; and thereupon said Commissioner directed defendant to construct a drain to and past this land; and defendant in the construction of said drain entered upon said land so taken possession of, and in the necessary prosecution of said work threw down said fences, and deposited the earth from said ditch on the plaintiff's land, and filled up the water courses thereon, the same being necessary for the construction of said drain, which are the alleged trespasses.

*Held*, on demurrer, a good plea; for it must be taken to mean that the Commissioner had lawfully taken possession in accordance with the Act, having complied with all requisite preliminaries.—*Bury v. Britton et al.* 547.

See FRAUDULENT REPRESENTATION,  
2.—MISJOINDER.—PRINCIPAL AND  
SURETY.

## POLICY OF INSURANCE.

*Magistrate's certificate.*—See INSURANCE, 1.

*Two-thirds clause.*—See INSURANCE, 2.

## POSSESSION.

See SALE OF LAND, 1.—TROVER, 1.

## POST MASTER.

*Bond by surety for.*—See PRINCIPAL AND SURETY, 2.

## PRACTICE.

See BOND.—MORTGAGE.—NEW TRIAL.

## PRACTICE AT NISI PRIUS.

1. Counsel may read a reported case to the jury, in order to shew the law, and for that purpose may refer to the facts; but he cannot go into the facts to shew how a former jury treated the same or analogous facts, and thus argue as to what the verdict should be.—*Dougherty v. Williams et al.* 215.

2. Remarks as to the power of the Judge to order the postponement of the trial of an interpleader issue where the interpleader order directs it to be tried at a particular sittings.—*Robinson v. Richardson*, 344.

## PRESUMPTION.

*Of death.*—See TAX SALES, 3.

*Of continuance of Title.*—See TRESPASS, 2.

## PRINCIPAL AND AGENT.

*Agency—Ratification—Implied authority—Action on replevin bond—*

*Damages.*—In an action on a replevin bond against principal and sureties, the breach assigned was the non-return of a portion of the timber replevied, for which the defendants in replevin, the now plaintiffs, obtained judgment.

It appeared that the timber, when replevied, was on the banks of a river some distance above the point where it was intended to be shipped, and by directions of F., the plaintiff in replevin, it was put into the possession of one L., who was F.'s general agent for looking after his lands in that part of the country. L. authorized the defendant in replevin to take it down to the shipping point, where it was again taken possession of for F., by a person appointed by L. to receive it there, and shipped for F.—L. had been forbidden by F. to permit this removal to the shipping point, but the defendant in replevin was not aware of it, and such removal was to the benefit of whoever might be the owner. *Held*, 1. That the receipt of the timber at the shipping point by F. was a ratification on his part of the removal, though such removal was in violation of his orders.

2. That it was properly left to the jury to say whether L., from the nature of the property and its situation, and being appointed agent to receive possession, had reasonable authority to arrange that it should be taken to the shipping point for the benefit of all concerned; and that they were fully warranted in finding that he had.

*Semble*, that the plaintiff, though entitled therefore to recover against F. the value of the timber at the shipping point, could, as against the sureties, recover only its value



when replevied.—*Patterson et al. v. Fuller et al.* 240.

See DEFAMATION, 1.

## PRINCIPAL AND SURETY.

*Discharge of surety by giving time—Construction of agreement—Reservation of rights against surety.*—To a declaration on two promissory notes and a mortgage made by defendants they pleaded, on equitable grounds, that they made the notes, &c., as security only to one J. McD., and upon the terms of an agreement set out, which provided that upon J. McD. making certain payments in a given time, and giving these notes and mortgage, the plaintiffs would release J. McD. from his indebtedness. It also contained a stipulation that the securities now sued on were to be regarded as so much additional value to J. McD.'s assets, and defendants were not to be indemnified or reimbursed in respect of them under penalty of relieving the plaintiff from carrying out the agreement. The plea then alleged that the notes and mortgage were made and accepted on the faith of this agreement, and that subsequently, without the privity or consent of defendants, the plaintiff and J. McD. entered into a new arrangement, set out in the plea, by which the indebtedness of J. McD. was fixed at a new and larger sum, which the plaintiff agreed to accept in full of all claims against him and his sureties; part of this sum was to be paid in money at a future day, additional securities were handed over and promised to the plaintiff, and other and prolonged times were fixed for the payment, and it was stipulated that on the securi-

ties being completed and said money paid according to this agreement, the plaintiff would hand over and release all other securities held by him. The defendants alleged that this last agreement was taken in satisfaction of the first, and that the defendants were thereby released from liability by such extension of time. The plaintiff replied that the defendants had been indemnified contrary to the terms of the first agreement.

*Held*, on demurrer, that the plea was good: that the stipulation against the indemnity of defendants could not deprive them of their rights as sureties: that there was not in the second agreement any reservation of the plaintiff's rights under the first; and that without such a reservation distinctly expressed defendants were discharged.

*Held*, also, replication bad, for that the stipulation relied on applied only as between the principal debtor and the plaintiff, and the breach of it could give no right of action against defendants.—*Mulholland v. Broomfield et al.* 369.

2. *Bond by surety for postmaster—Neglect by the department to proceed against the principal—Effect of 33 H. VIII., ch. 39, sec. 79.*—To a *sci. fa.* against P. on a bond to the Crown, dated 5th June, 1865, in \$2,000, conditioned that one W. should duly perform his duties as postmaster at C., and pay over to the postmaster-general all moneys, defendant pleaded that W. converted the moneys to his own use with the knowledge of the postmaster-general, but without defendant's knowledge; and that the postmaster-general did not inform defendant of W.'s default, but continued him in the office for three years,



during which he frequently made default, and did not compel him to pay over each three months in pursuance of the statute, and was guilty of gross negligence in the matter, by reason whereof C. was in good conscience discharged.

By Consol. Stat. U. C. ch. 31, postmasters were required to give bonds for the faithful discharge of their duties required by law or which might be required by any instruction or general rule for the government of the department; the postmaster-general might appoint the periods at which they should render accounts, and if any postmaster should neglect or refuse, at the end of every such period, the postmaster-general should cause a suit to be commenced against him; and a postmaster neglecting or refusing to account and pay over for a month after the time prescribed, was subject to a specified penalty. The Dominion Act of 1867, 31 Vic. ch. 10, repeated these enactments, and the Audit Act of that year, ch. 5, like the C. S. U. C. ch. 16, required all officers employed about the revenue to render accounts and pay over at least once in three months.

It appeared that W. on the 30th June, 1866, made default for two quarters, exceeding \$900, which was notified to the inspector, and afterwards settled. In December, 1866, he again made default for two quarters more, of which the inspector became aware in January, and there was a running balance against him until April, 1869, when it exceeded \$2,500; after that he paid up current collections and reduced the old debt, and a new bond was taken in 1870. Up to that time he had been constantly pressed for payment by the department, but

not sued. The sureties were not informed of his default, and on one occasion, when he owed over \$2,000, the inspector told him he must inform the sureties, but was dissuaded by him from doing so. There was never, however, any arrangement to give time, but a constant pressure for immediate settlement; and the surety was not shewn to have made any enquiries on the subject.

*Held*, that, apart from the statutory provisions above mentioned, there was no ground upon which the sureties, under the 33 H. VIII. ch. 39, sec. 79, could claim to be relieved, and that these provisions imposed no obligation on the postmaster-general towards the surety.

*Held*, also, that plea was bad in law, as shewing no defence, and because the surety would at all events be liable for at least one quarter's default, which would entitle the Crown to judgment.—*Regina v. Pringle et al.* 308—See however note on page 324.

See PLEADING, 4.

## PRIVILEGED COMMUNICATIONS.

See DEFAMATION, 1.

## PROBABLE CAUSE.

See INLAND REVENUE.

## PROMISSORY NOTE.

*Signature by marksman—Proof of.*—Per *Wilson, J.*, the evidence in this case stated in the report, was insufficient to shew that defendant was the maker of the note sued on, alleged to have been signed by him as marksman, and the plaintiff should have been non-suited.

The defendant, however, filed an affidavit that he was not the maker, and explaining his absence from the trial, and on this ground a new trial was granted.—*Hand v. Agnew*, 559.

See PLEADING, 5, 6.

## PROOF OF SEARCH.

*For lost deed.*]—See EVIDENCE, 4.

## QUESTIONS OF LAW.

*Right to reserve in election trials.*] See ELECTIONS, 1

## QUARTER SESSIONS.

See HIGHWAYS, 2.

## RAILWAYS.

1. 16 Vic. ch. 99, sec. 7.—*Money paid into Court—Application for.*]—F., the owner of land required for the Canada Air Line Railway, having refused the sum tendered by the company, an arbitration was had, which awarded to him \$800, and settled the costs of the award at \$31. This sum he refused to receive without his costs and interest from the date of the award; whereupon the company paid it into Court, with six months' interest, under 16 Vic. ch. 99, sec. 7, and a notice was published as that clause directs. F. then applied for a rule upon the company to shew cause why the money should not be paid to him, with interest and costs of arbitration, and why they should not join in the conveyance, or give an undertaking to secure the construction and maintenance of a farm-crossing, which the award provided for:

*Held*, that the application must be refused, for that the company having taken all proper proceed-

ings under the section mentioned, had acquired the title, and had nothing more to do; and the applicant's proper course was to file his claim and apply as the section provides.—*Re Foster and G. W. R. Co.*, 162.

2. 16 Vic. ch. 99—*Application for money paid into Court—Costs of arbitration.*]—Under 16 Vic. ch. 99, sec. 5, if a greater sum be awarded for land taken by the Great Western R. W. Co. than that tendered by them, "the Company shall pay all costs and charges attending such arbitration;" but no provision is made for their recovery. The Court refused to make an order on the Company for payment of such costs; and, *Semble*, that the only remedy is by an action of debt on the statute.

The money awarded having been paid into Court by the Company, with six months' interest, and it being from no fault on their part that the claimant did not receive it within the six months, the Court discharged with costs a rule calling upon them to pay further interest; and it was referred to the Master to report as to the claims filed, and the right of the applicant to the money.—*Re Foster and G. W. R. Co.* 503.

See DEFAMATION, 1.—LIEN.—PASSENGERS' LUGGAGE.

## REASONABLE AND PROBABLE CAUSE.

See INLAND REVENUE.

## REGISTRATION OF JUDGMENTS.

See SALE OF GOODS.

## REGULÆ GENERALES, 203, 214.

## RELEASE.

See PLEADING, 1.

## RENT.

*Deduction of.*]—See LEASE.

## REPLEVIN.

*Held*, following *Deal v. Potter*, 26 U. C. R. 578, that in an action of replevin the plaintiff was entitled to recover as damages the value of any of the goods which could not be replevied.—*Lewis v. Teale et al.* 108.

Notice of action is unnecessary in replevin.—*Lewis v. Teale, et al.* 108.

See MILITIA—NOTICE OF ACTION.  
—PRINCIPAL AND AGENT.

## REPORTER.

*Appointment of*, 641.

## RE-SALE.

See SALE OF GOODS.

## RESERVATION IN DEED.

See TROVER, 1.

## RIGHT OF WAY.

*Construction of grant—Action for obstructing—Proof of damage—Estoppel—“High water mark,” “water’s edge”—Devise—After acquired property—Right of action by one tenant in common.*]—O., on the 15th December, 1848, conveyed to P. part of lot 33, bounded by a highway on the north, extending to the water’s edge of the river St. Lawrence, and thence easterly along the water’s edge, which formed its southern limit; and he conveyed by the same deed, “as appurtenant to the land, a full, free, and unrestricted right of way in,

over, upon, and along, and to use as a public highway or street, a certain strip of land of twenty feet in breadth, adjoining the westerly side of the said parcel of land, and extending from the highway aforesaid to the water’s edge of the river St. Lawrence, at all times and seasons forever hereafter.” The patent to O. for the same land extended only to high water mark of the river.

P., by his will, dated 29th March, 1847, after giving several legacies, devised in fee to the plaintiff, who was also one of his heirs-at-law, the rest and residue of his estate, both real and personal. Defendant, who claimed the rest of lot 33 not conveyed, erected a boat-house in the river, partly above high-water mark, covering almost ten feet in width of the strip of twenty feet.

In an action for thus obstructing the plaintiff’s right of way :

*Held*, 1. That the way was clearly a private, not a public way, the words “to use as a public highway or street” indicating only the extent to which the grantee might use it.

2. That the obstruction, without actual damage, gave the grantee a cause of action, for it was an interference with his easement, which, if submitted to, would become a right.

3. That it would be no defence that the boat-house was below high water mark, though O.’s right only extended so far, for O. and the defendant, claiming under him, were estopped by O.’s deed to P., which granted to the water’s edge.

Per *Wilson, J.*, high water mark is the limit of the highest ordinary state of the river, or its average height in its ordinary state after the



spring flood has abated, not the highest limit reached in the year.

Per *Draper*, C.J., of Appeal, and *Wilson*, J. This land, acquired after the date of P.'s will, did not pass by the residuary devise to the plaintiff; but *Held*,

4. That the plaintiff, as one of P.'s heirs-at-law, could maintain the action, there being no plea of non-joinder. — *Plumb v. McGannon*, 8.

## ROAD COMPANY.

See *HIGHWAY*, 1.

## RULE NISI.

*Appeal from.*]—See *APPEAL*, 1.

## SALE OF GOODS.

1. *Sale of goods—Default in payment of balance—Re-sale by vendor—Right of vendee.*]—The plaintiff having negotiated with defendant for the purchase of a pair of horses and harness from defendant for \$400, paid \$154 in cash, and after some correspondence as to the time and mode of paying the balance, defendant sold the property, whereupon the plaintiff sued, declaring on a special count for not delivering the horses sold to him, and on the common counts.

A verdict on the common counts for the sum paid was sustained, on the ground that upon the evidence, set out below, it was not clear that any agreement was ever arrived at as to the terms and time of payment.

*Quære*, as to the plaintiff's rights, if there had been a contract. *Semble*, per *Wilson*, J., that on tender to him, of the price *after the conversion by re-sale*, the defendant on non-delivery of the goods would be liable in trover, such non-delivery being a refusal which would vest the right of action by relation; but

that, at all events, the plaintiff could in some form of action recover, though perhaps not the full amount paid by him.—*Heffernan v. Berry*, 518.

2. *Action for non-delivery—Proof of contract, and readiness to accept.*]—In an action for non-delivery of 15 bales of hops, alleged to have been sold by defendant to plaintiffs, the evidence shewed that, in conversation with one of the plaintiffs about the purchase of hops, defendant said he would sell at 20 cents per pound, and would keep the offer open for a few days. Subsequently, on the 17th of August, plaintiffs telegraphed defendant, "Will take 15 to 20 bales good new hops at 20 cents cash." On the 21st defendant replied by telegram, "Your offer accepted. Have booked your order for 15 bales new hops for delivery when picked." On the 16th of September defendant telegraphed "Hops picked, ready for delivery. Answer back." On the 21st of September plaintiffs telegraphed, "Our man will be there ready to receive hops early next week," and on the 26th of September, "Ship the 15 bales hops to us at Galt today, and draw at three days sight;" and on the 27th, "If hops not shipped will send team and money for them to-morrow. Answer quick." On the same day defendant replied, "Cannot have hops." A tender of the price was subsequently made and refused.

*Held*, 1. That there was no binding contract at any time between the parties, for the defendant's answer of the 21st of August was not a simple acceptance of the plaintiff's offer of the 17th, but qualified it both as to quality (by leaving out the word *good*) and as



to time of delivery; and assuming defendant's telegram of the 16th September to be a renewal of such acceptance, the plaintiffs' subsequent telegrams did not shew an assent to it.

*Held*, also, that if there had been a previous binding contract the plaintiffs' delay, while the market was rising, in not answering the telegram of the 16th of September until the 21st, justified the jury in finding, as they did, that the plaintiffs were not ready and willing to accept and pay for the hops within a reasonable time.—*Carter et al. v. Bingham*, 615.

### SALE OF LAND.

1. *Sale of mill site—Contract—Construction—Amendment—Defective title—Possession—Right to recover back purchase money.*]—Plaintiff declared on the common counts, and on a special agreement by defendant to sell to the plaintiff certain land, together with two mills and a head of water, for the purpose of working said mills, of twelve feet, and to convey the same to the plaintiff at defendant's expense.

The defendant on the 4th of April, wrote to the plaintiff, "There is about twelve feet of a fall of water, and it might be raised to twenty feet if required." And in answer to a letter from the plaintiff asking for some explanation, he again wrote, on 3rd May, "The twelve feet fall is at the oat mill, and can be raised to twenty feet, or any height required." It was proved that the whole fall to be had upon the property was less than eight feet.

*Held*, that the contract was proved as to the head of water; for though in his first letter the fall was said to be "about twelve feet," it was described in the second as

"the twelve feet fall," and in both it was said that it could be easily raised to twenty feet.

*Semble*, that though defendant was not expressly to make a deed, and at his own expense, yet the fact that he would not allow the plaintiff to have it prepared, but insisted on its being drawn by his own lawyer, was some evidence that this was the bargain.

The Court, however, allowed an amendment by striking out this allegation, and inserting an averment (which would excuse the not making and tendering a conveyance), that defendant could not make a title and give a right to raise the water twelve feet, this being clearly in accordance with the evidence.

The plaintiff had gone to the mill on a Thursday without defendant's knowledge, and remained till Saturday. On the Tuesday following he returned and stayed a day or two, not using the mill, but mending a leak in the mill gate; and he gave it up because the title could not be made.

*Semble*, that such possession, not taken by the agreement nor sanctioned by defendant, could not prevent the plaintiff from recovering back under the common counts what he had paid on account of the purchase money.—*Clarke v. McKay*, 583.

2. *Contract for land to be selected—Time for making selection—Specific performance.*]—R. gave a bond to B., to convey to B. a water privilege on lot 17, and to convey also so much land as he might require for the purpose of making a race-way, or for erecting buildings on the said lot, at the rate of £10 per acre.

*Held*, that the selection of such

land must be made during the lifetime of both obligor and obligee.

*Quære*, per *Wilson, J.*, whether a bill would lie for the specific performance of such a contract.—*Burnham et al. v. Ramsay et al.* 491.

See DESCRIPTION OF LAND.

## SCHOOLS.

See COMMON SCHOOLS.

## SCIENTER.

See FRAUDULENT REPRESENTATION. 2.

## SECONDARY EVIDENCE.

See EVIDENCE, 4.

## SEAL.

See PLEADING, 4.

## SEPARATE FINDING.

See ARBITRATION.

## SERVICE OF PAPERS.

See EJECTMENT.

## SHERIFF'S SALE.

*Statute of Elizabeth—Registration of judgment.*—In ejectment the plaintiff claimed through a deed from J. M. to J. The defendant claimed through a purchase at sheriff's sale under execution against J. M., at the suit of one C.

The deed from J. M. to J. was made on the 4th of February, 1857. C.'s judgment against J. M. was entered on the 21st June, 1855, and registered on the 22nd in the Registry office. On the 6th of July, 1859, the Sheriff sold the lands under a *pluries fi. ja.* tested 31st of March, 1858:

*Held*, that the plaintiff's deed

could not transfer the estate previously vested in J.—*Morrison v. Stear*, 182.

See SALE OF LANDS.

## SHIPPING.

*Charter of vessel—Delay in arrival of cargo—Refusal to ship.*—The plaintiff's vessel, then at Kingston, was engaged by defendant about the 24th of October, 1869, to carry to Kingston a cargo of wheat, part of which was to be shipped at Dresden or Chatham, and the rest at Detroit. She left Kingston about the 27th October, and owing to stress of weather, but to no fault of the plaintiff, did not reach Detroit until the 15th of November. When it seemed improbable that she would have time to ship her cargo and get back to Kingston that season. The defendant, on this ground refused to load her, for which the plaintiff sued.

*Held*, that he could not recover; for defendant was not bound to ship his wheat unless the vessel arrived within a reasonable time, and, under the evidence, which is more fully set out in the case, he was justified in his refusal.—*Brown v. Lamont*, 167.

## SPECIFIC PERFORMANCE.

See SALE OF LAND, 2

## STAMPS.

See PLEADING, 5.

## STATUTES (CONSTRUCTION OF).

33 Henry VIII. ch. 39, sec. [79.].—See PRINCIPAL AND SURETY.

8-9 Wm. III. ch. 11.].—See BOND, EXECUTION.

50 Geo. III. ch. 1.].—See HIGHWAYS.

4-5 Vic. ch. 7.]—*See ALIENAGE.*  
 12 Vic. ch. 197, sec. 10.]—*See ALIENAGE.*  
 13 & 14 Vic. 67.]—*See TAX SALES, 2.*  
 16 Vic. ch. 99, sec. 7.]—*See ARBITRATOR, 12.*  
 18 Vic. ch. 130.]—*See JURY EXPENSES.*  
 Consol. Stat. U. C. ch. 15.]—*See COUNTY COURT JUDGE.*  
 Consol. Stat. U. C. ch. 19, sec. 198.]—*See JUSTICE OF THE PEACE.*  
 Consol. Stat. U. C. ch. 24, sec. 15.]—*See ATTORNEY.*  
 Consol. Stat. U. C. ch. 27, sec. 17.]—*See TAX SALES.*  
 Consol. Stat. ch. 31, secs. 155, 156, 157.]—*See JURY EXPENSES.*  
 Consol. Stat. U. C. ch. 53.]—*See TAX SALES, 1.*  
 Consol. Stat. U. C. ch. 64, sec. 27, ss. 9.]—*See COMMON SCHOOLS.*  
 Consol. Stat. U. C. ch. 83, sec. 44.]—*See HUSBAND AND WIFE,*  
 Consol. Stat. U. C. ch. 93, sec. 67.]—*See MUNICIPAL LAW, 2.*  
 27 Vic. ch. 3.]—*See REPLEVIN.*  
 27 Vic. ch. 19, sec. 4.]—*See TAX SALES, 1, 3.*  
 29 Vic. ch. 39.]—*See COUNTY COURT JUDGE.*  
 29-30 Vic. ch. 51, sec. 296, sec. 325; ss. 20, 21.]—*See MUNICIPAL LAW, 1.*  
*See PLEADING, 6.*  
 29-30 Vic. ch. 53. secs. 131, 155, 156.]—*See TAX SALES, 1, 3.*  
 31 Vic. ch. 40, sec. 89.]—*See REPLEVIN.*  
 31 Vic. ch. 8, D.]—*See INLAND REVENUE.*  
 32-33 Vic. ch. 22, sec. 7, D.]—*See ARSON.*  
 32 Vic. ch. 21, sec. 7, ss. 1, 3, 10.]—*See ELECTIONS, 1, 3.*  
 32 Vic. ch. 23, O.]—*See TAX SALES, 3.*  
 32 Vic. ch. 28, O.]—*See PLEADING, 7.*  
 32 Vic. ch. 36, secs. 130, 155, O.]—*See TAX SALES, 1, 3.*  
 33 Vic. ch. 13, O.]—*See EVIDENCE, 1.*  
 33 Vic. ch. 23, O.]—*See TAX SALES, 3.*  
 34 Vic. ch. 3, secs. 20, 47, O.]—*See ELECTIONS, 1, 2, 6.*  
 34 Vic. ch. 33, sec. 30, O.]—*See COMMON SCHOOLS.*  
 Insolvent Act of 1864-'65.]—*See INSOLVENCY 1.*  
 " " 1869.]—*See INSOLVENCY, 1, 2.*

## STRIKING OFF THE ROLLS.

*See ATTORNEY, 1.*

## SUMMARY CONVICTION.

*See JUSTICE OF THE PEACE.*

## SURVEY.

*C. S. U. C. ch. 93, secs. 6, 7—Survey under—Motion to quash by-law—Acquiescence of applicant.]—*  
 Sec. 6 of C. S. U. C. ch. 93, authorizing the county council to apply to the Governor to cause a concession line to be surveyed, applies only where such line was not run in the original survey, or has been obliterated. Where, therefore, it appeared that there were in fact two lines clearly traceable, the question being which was the original line, and the surveyor decided this upon conflicting evidence: *Held*, that such survey was not binding or conclusive, and that a by-law of the township adopting it must be quashed.

*Held*, also, that the acquiescence by the applicant in the line thus adopted (which was a highway) could not be urged against the application, other interests than his, both public and private, being affected.

Sec. 7 directs that the surveyor shall so draw the line as to leave each of the adjacent concessions of a depth proportionate to that intended in the original survey. The depth of the concession on the north side of the line in question lay from north to south, and the concessions on the south extended in depth from east to west, so that the depth of that to the north only would be affected by the position of the line.

*Semble*, that this would not prevent the application of the statute. —*Re Fairbairn and The Corporation of Sandwich East, 573.*

*See EVIDENCE, 2.*



## TARIFF OF FEES, 203.

## TAX SALES.

1. *Ejectment—Notice under Consol. Stat. U. C. ch. 27, sec. 17.*—Land sold for taxes under C. S. U. C. ch. 53, was described in the assessment roll, advertisements, and treasurer's warrant, as the south part of the west half of lot 17, in the 9th concession of Rawdon, 75 acres; and in the sheriff's deed by metes and bounds, *Held*, that according to *Knaggs v. Ledyard*, 12 Grant 320, and *McDonnell v. McDonald*, 24 U. C. R. 74, such description was insufficient.

*Wilson, J.*, but for these decisions, would have held the description sufficient, as meaning the south 75 acres of the west half.

The plaintiff in ejectment claiming through this sale, and being a *bonâ fide* purchaser, gave defendant a notice, under sec. 17 of the Ejectment Act, C. S. U. C. ch. 27, requiring him to prove his title. *Held* that defendant, upon the evidence set out in the report, was a mere intruder; that the case was within the statute; and that defendant could not take advantage of the defective description.

Such a defect would not be cured by the 27 Vic. ch. 19, sec. 4, or by the 29-30 Vic. ch. 53, sec. 156, or the 32 Vic. ch. 36, sec. 155, O.—*Booth v. Girdwood*, 23.

2. 13 & 14 Vic. ch. 67—*Sale for Taxes—Occupied land sold as non-resident.*—Under the 13 & 14 Vic. ch. 67, land was sold in 1852, for taxes of several years, including 1851, for which year the collector's roll had been returned to the treasurer, with his affidavit that the reason for not collecting the amount was that the land was non-resident. It was proved clearly, however,

that from the 6th February, 1851, until long after the sale, the land had been occupied by defendant's father, who lived upon it with his family.

*Held*, that the sale was illegal.

It was objected also that there was no proof of want of distress on the land, nor of the advertisement of sale; that the affidavit of the collector was insufficient; that the assessment was not proved; that sections 45 and 46 of the Act had not been complied with; and that the sheriff did not sell that part of the lot most beneficial to the owner; but these objections, upon the evidence set out in the report, were overruled, except the last, which was not decided.—*Street v. Fogul*, 119.

3. *Evidence—Presumption of death—Sale of Lands for taxes.*—The patent from the Crown issued in 1848, to Mary Ann Tribe, describing her as the wife of Benjamin Tribe. In 1853 she conveyed to L., not describing herself as a widow.

*Held*, that the description in the patent was some evidence of her being married when it issued; but the Court being left to draw inferences as a jury presumed, in favor of the validity of her deed made in 1853, that she was then sole and competent to convey.

The mortgage under which the plaintiffs claimed, executed in 1861, described the land as lot 5 in the 4th concession of Flos, containing 200 acres "save and except 35 acres sold off the east side of said lot number five to Jonathan Lane for taxes." Lane had bought 35 acres in 1858. The certificate of purchase then given to him by the sheriff, had a diagram sketched on it, shewing this to be the east 35



acres, and the same diagram was on the certificate and deed given in 1865 and 1866 to one J., who purchased the remaining 165 acres, and under whom the plaintiffs claimed. *Held*, that the description in the mortgage was sufficient, the exception being thus clearly defined.

The patent granted the lot by north and south halves. The patentee in 1853, conveyed the lot as a whole, and it continued in one owner until the sale of the 35 acres in 1858 above mentioned. In 1858 and 1859 each half was assessed separately. *Held*, not objectionable.

For the next three years it was assessed in two parcels of 165 acres and 35 acres, and for the succeeding two years the north half, 100 acres, and the west part south half, 65 acres, were assessed, with a valuation of \$330 on the whole. *Held*, right.

In 1865 the 165 acres was sold for the taxes due for six years, including 1858, which was not covered by the warrant under which the 35 acres were sold in that year. *Held*, that the sale as to 1858 could not be supported, for all or a part of each half should have been sold for the taxes due on it for that year notwithstanding the sale of the 35 acres; that as there were not five years due of any portion of the residue for which the warrant issued, the whole sale must fail; and—following *Yokham v. Hall*, 15 Grant, 335—that this defect was not cured by the 27 Vic. ch. 19, sec. 41, 29–30 Vic. ch. 53, sec. 131, or 32 Vic. ch. 35, sec. 130 O.

But for that decision *Wilson, J.*, would have held otherwise.

The Sheriff's deed was given on the 19th of May, 1866, and the action was not brought until the 13th

of January, 1871. *Held*, that the plaintiff was not barred by the 29–30 Vic. ch. 53, sec. 156, passed on the 15th of August, 1866, which made valid all tax deeds due before it, unless questioned within four years from their date; for that the effect of the 32 Vic. ch. 36, sec. 155 O, passed on the 23rd of January, 1869, was to give two years from the passing of that Act to all whose rights were not then barred.

It was objected that the description of the land on the roll and in the warrant, as the north half and west part south half 165 acres, and the north half 100, and west part south half 65, was insufficient, and that the treasurer had improperly altered the roll so as to reduce the taxes by one half, and make the description still more defective, but *Held* that these objections would be cured by the 27 Vic. ch. 19, sec. 4 and 29–30 Vic. ch. 53, sec. 131.

*Held* also, that the plaintiff was not bound to pay the value of improvements under 33 Vic. ch. 23, O., for the sale was not void by reason of uncertain or insufficient description of the lands sold, and therefore not within the statute.—*Edinburgh Life Insurance Co. v. Ferguson*, 253.

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## TEACHER.

See COMMON SCHOOLS.

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## TENANTS IN COMMON.

See TRESPASS, 2.

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## TITLE.

See EJECTMENT.—TRESPASS, 2.

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## TREES.

See TROVER.

## TRESPASS.

1. *Boundary—Estoppel.*—In an action of trespass, *q. c. f.*, it appeared that defendant conveyed to the plaintiff 19 acres of lot 2 in the 5th concession of Barton, described by metes and bounds, commencing at the north-east angle of the lot. This starting point upon the ground was undisputed, and it was admitted that the description given enclosed the land claimed by the plaintiff.

*Held* that defendant was estopped by his deed, and could not set up any question as to boundary between lots 1 and 2,—*Crossthwaite v. Gage*, 196.

2. *Trespass to land—Justification under tenant in common—Judgment in ejectment.*—To an action of trespass *quare clausum fregit*, alleging the land to be the plaintiff's, and that defendant ejected the plaintiff and took all the issues and profits, defendant justified under a demise from one M., who he alleged was seised in fee as a tenant in common of the land. The plaintiff excepted to the plea. *Held*, that the plea was good, as setting up title in a third party, for the plaintiff brought his action as owner of the whole, and not against defendant as co-tenant.

In trespass for mesne profits, &c., defendant justified under a demise from a tenant in common for one year from May, 1871. The plaintiff replied estoppel by a judgment in ejectment recovered in 1870, against a tenant of defendants' then in possession, of which suit defendants had notice. On demurrer to the replication, on the ground of want of privity between the tenant in common and the defendant in ejectment, and because it did not

appear that the title under which the plaintiff recovered in ejectment continued up to the demise to defendant: *Held*, that the replication was good, the presumption being that the title continued until the contrary was shewn.—*Herr v. Weston et al*, 402.

See PLEADING, 7.

## TRIAL.

See PRACTICE AT NISI PRIUS.

## TROVER.

1. *Trees reserved.*—The patent to A. C., in 1803, contained the clause, then usual, saving and reserving to the Crown all white pine trees.

*Held*, that notwithstanding this reservation the plaintiff, claiming under the patentee, could maintain trover against defendant for the white pine; for the soil in which they grew was his, and he was entitled to their shade as against a stranger.

*Held*, also, that the evidence of possession, set out in the report, being such as an owner could be expected to have of wild land, would alone have been sufficient to entitle the plaintiff to maintain the action.—*Casselman v. Hersey*, 333.

2. *Sale by one defendant forbidden by the other.—Damages.*—The defendant G. and two others, having executions against W. & K., directed the seizure of certain goods. The plaintiff to whom the goods belonged, demanded them of the bailiff, who refused to give them up. G. afterwards directed the bailiff not to sell or do anything more on his execution, but it did

not appear that he told the plaintiff of this, or ordered the goods to be returned to him. The plaintiff then brought trover against the bailiff and G., and the bailiff afterwards sold the goods under the other executions, paying over no portion of the proceeds to G.

*Held*, that G. was liable for the full value of the goods, for the plaintiff's right of action accrued on the demand and refusal, and was not defeated by what took place afterwards.—*Macklem v. Durrant et al.* 98.

See SALE OF GOODS, 1.

### VESTING ORDER.

A vesting order in Chancery vesting all the estate of O. in the plaintiff, is sufficient proof of plaintiff's title without shewing why it was made.—*Gordon v. McPhail*, 480.

### VOTERS.

*Carriage of.*—See ELECTIONS, 1.  
*Lists, effect of using wrong.*—See ELECTIONS, 3.

### WATER-COURSE.

See DESCRIPTION OF LAND, 2.—  
RIGHT OF WAY,

### WAY.

See HIGHWAY—RIGHT OF WAY.

### WILL, CONSTRUCTION OF

1. *Estate for life or in fee.*—J.S., he and his children being aliens, demised certain lands on the 22nd March, 1824, to Hannah, his daughter, for life, and after that to

her husband if he should survive her, at a nominal rent. On the 24th March, 1828, he, by his will, devised to his son Samuel all his lands by him "freely to be possessed and enjoyed \* \* " after the death of Hannah and her husband "if she dies without heirs." J. S. died in May, 1828. Samuel, before his death in 1842, had given a bond for a deed of the land to one I., and the trustees under his will conveyed in fee to I. in 1871. Hannah died in 1869 without issue, and her husband in 1864.

*Held*, that under the devise in the will of J. S., Hannah took a fee, by reason of Samuel's incapacity through alienage to inherit as her heir-at-law, the intervention of the possible estate for life of Hannah's husband making no difference.

If Samuel had been capable of inheriting, Hannah would have taken an estate tail only, with remainder to him in fee; for the limitation over to him on failure of heirs would be restricted to lineal heirs, he himself being a relative, and capable of being a collateral heir.

*Quære*, whether Samuel, if not an alien, would have taken in fee or for life under the words "freely to be possessed and enjoyed," &c., in the will of J. S.

The defendant was held not estopped from setting up the alienage of Samuel, for he claimed under Hannah, whose title he supported against that of Samuel.—*Iler v. Elliott et al.* 434.

2. *Estate tail or for life*—*Rule in Shelley's case*—H. devised lands "in trust for the only benefit of R. B., for and during his natural life, without impeachment of waste, and from and after the



determination of that estate, in trust for the heirs of the body of him, the said R. B., and in default of such issue, then in trust for the next heirs of me, the said H."

*Held*, clearly within the rule in Shelley's case, and that R. B. took an estate tail.—*Tunis et al. v. Passmore*, 419.

3. *Ejectment—Estate tail*—"Revert in the same way."—A testator, who died in 1868, devised land to his son D., and other land to his daughter A., charged with legacies to his other children. The will further declared that if D. died without heirs, D.'s property "shall remain for the use of his widow during her life, after which it shall be divided as seems best, between the rest of my children," and if A. died without heirs, the property devised to her, "shall revert in the same way." D. was married before the making of the will, and A. after the testator's death married the plaintiff, and died in 1870.

*Held*, that D. and A. took estates tail for, the persons in remainder, the rest of the testator's children being the collateral heirs of D. and A., only lineal heirs could have been intended to take under D. and A.

*Held*, also, that the words "revert in the same way," meant "shall follow in like manner," and that therefore A's husband, after her decease, took a life estate in the property devised to her, as D.'s wife would take in that devised to B.—*Jardine v. Wilson, et al.*, 498.

4. *Power or fee.*—A. C., by his will, dated in 1803, directed that his debts should be paid by his executors out of his real and personal estate, and that as soon as necessary or convenient

such of his executors as should prove should sell his real estate and invest one-half of the proceeds or amount of sale thereof, and apply the product interest for the support of his wife during her life. This one-half of the amount of sale he devised to her for life for that purpose, and after her death, he bequeathed it equally among his four children. The "remaining half of the proceeds or amount" of his real and personal estates he devised to the said children, share and share alike. The widow and two sons were named as executors, but the widow alone proved in 1810. The land in question was never sold by her under the power in the will, and in 1817 she died, leaving all her real and personal estate, by will, to the two surviving children, J. C. and E. C.

*Held*: 1. That the widow took a power to sell only, not a fee in the land.

2. That the legal estate passed by the devise to the legatees and devisees of the testator, and did not descend upon the heir.

Where in a will there is a charge of debts upon the real and personal estate, and an express power is given to the executors to sell, and the proceeds of the sale are devised in certain proportions, the effect is the same as if the testator had devised the lands unequivocally to the devisees of such proportions.—*Casselman v. Hersey*, 333.

*After acquired property—Effect on of residuary devise.*—See RIGHT OF WAY.

## WITNESS FEES.

See ELECTIONS, 2.



## WITNESSES.

See EVIDENCE.

## WORDS.

*"Building,"* definition of.]—See ARSON.

*"Detained."*]—"Detained" in a declaration in detinue means an adverse detention, and it is unnecessary to plead leave and license specially.—*Bain v. McDonald*, 190.

*"Falsely and Fraudulently."*]—See FRAUDULENT REPRESENTATION.

*"Freely to be possessed and enjoyed."*]—See WILL, 1.

*"High water mark."*]—See RIGHT OF WAY.

*"Illegal and prohibited acts in reference to elections."*]—See ELECTIONS, 1.

*"Revert in the same way."*]—See WILL, 3.

*"Spirits."*]—See INLAND REVENUE.

*"Water's edge."*]—See DESCRIPTION OF LAND, 2.

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